In the
Supreme Court of the United States

OCTOBER TERM, 1960

No.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, LOCAL UNION No. 310, PETITIONER,

v.

THE NATIONAL LABOR RELATIONS BOARD, RESPONDENT,

and

SHAMROCK DAIRY, INC., INTERVENOR

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia, entered in the above-entitled case on June 16, 1960. Such judgment affirmed an order of the National Labor Relations Board directing the intervenor to bargain collectively with petitioner, particularly in respect to the adoption or continuance of "an independent distributorship plan" for its milk delivery drivers, but which order failed to grant petitioner certain other relief, including restoration of the status quo as it existed prior to the unfair labor practices engaged in by the intervenor.

OPINION BELOW

The Opinion of the Court of Appeals below is not yet reported and is attached hereto as Appendix A. See also R. 173.

JURISDICTION

The judgment of the Court of Appeals was entered on June 16, 1960, but the decree has not yet been entered.

The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254.

QUESTIONS PRESENTED

1. Where the Board has found that an employer had unlawfully, and in violation of Sections 8 (a) (1) and (5) of the National Labor Relations Act as amended, entered into individually signed distributorship contracts with all but six of its driver-employees (which six were discharged when they refused to sign) during the term of an existing collective agreement covering such drivers without first consulting with the union party thereto, and where the employer had not given the notices of termination or modification of the collective agreement and had not continued it in full force and effect for its term as required by Section 8 (d) of the Act, did the Board effectuate the policies of the Act and afford adequate relief when its order directed only that the employer bargain with the decimated union concerning future continuance or adoption of the individual contracts without also directing, as a condition to bargaining, that individual contracts already entered into be abrogated and the discharged drivers reinstated; and whether the Board should not have additionally found Section 8 (d) and 8 (a) (3) violations under the undisputed facts.

2. Whether, consistent with the protective policies of the Act, the Board under its own findings of fact, should have concluded that the drivers retained their employee

status notwithstanding the negotiation of the individual contracts.

STATUTES INVOLVED

The pertinent provisions of the Labor-Management Relations Act (61 Stat. 136, 29 U.S.C. Sec. 151, *et seq.*) are Section 2 (3), Section 7, Sections 8 (a) (1), (3) and (5), Section 8 (d), and Section 10 (c):

"Section 2 (3). The term 'employee' shall include any employee . . . . but shall not include . . . . any individual having the status of an individual contractor . . . ."

"Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

"Sec. 8 (a). It shall be an unfair labor practice for an employer—

"(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7: . . . .

"(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . .

"(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9 (a)."

"Sec. 8 (d). For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees

to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided,* That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

"(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

"(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

"(3) notifies the Federal Mediation and Conciliation Service within thirty days such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

"(4) continues in full force and effect, without resorting to strike or lockout, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract whichever occurs later: . . ."

"Sec. 10 (c) . . . If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: . . ."

STATEMENT

A. The Facts

The facts are as found by the trial examiner in his intermediate report, R. 144, which findings of fact were adopted by the Board in their entirety; there is no dispute concerning them. They can be summarized as follows:

Petitioner Local Union 310 (hereinafter called the Union) is a local union of truck drivers affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, with jurisdiction in the Phoenix and Tucson, Arizona, area and admitting to membership employees of the intervenor Shamrock Dairy, Inc., (hereinaffer called the Employer). That Employer is the owner and operator of a dairy plant and distribution business in Tucson, Arizona, in connection with which it employs drivers of milk delivery trucks, which drivers are members of and represented by the Union. Collective bargaining relationships between Shamrock Dairy, Inc., and the Union as the exclusive representative of such drivers had existed since 1937. The last contract between the parties was made in October, 1953, to run until October 1, 1955. That contract contained a clause (R. 113) stating that "No employee shall be required to make any verbal or written contract which in any way conflicts with the articles of this Agreement". Other provisions of the Agreement

accorded the Union exclusive recognition as representative of the Employer's drivers until the expiration of the contract in October of 1955.

In the middle of July, 1955, while the collective agreement was in full force, the employer, without notice to the Union, to the Federal Conciliation Department, or to State Mediation authorities as is mandatorily required under Section 8 (d) of the Act, and in direct disregard of the above-quoted portion of the Agreement, instituted individual negotiations with the drivers, and unilaterally imposed a so-called "independent distributorship plan", under which the Employer sold its milk routes and trucks to its drivers who then were to operate them, purportedly as independent contractors under individual contracts. All drivers but six were induced to sign the individual agreements by threats of discharge on the one hand, and by promise of benefit on the other hand in the form of cash credits to be used for the purchase of the trucks by those drivers who would agree to sign the individual agreements, such cash to come from credits due the drivers under their pension plan. Among other things, these individual contracts (R. 70) provided that the Employer had the right, unilaterally and for any cause, to terminate the contract and reacquire the "entire distribution business" of the driver, including the truck, at a preestablished price, to determine the time and place at which deliveries were to be made and to police the manner in which deliveries were made, to set the price at which the driver could buy and sell the milk, and to forbid the driver to sell any product not manufactured by the Dairy. The six drivers who refused to sign the individual contracts were discharged.

As soon as the Union learned of the establishment by the Employer of the independent distributorship plan, it dispatched a letter to the Employer, dated July 29, 1955, complaining of the Company's action as a breach of the existing collective agreement, and further stating that unless the

Employer was willing to rectify the situation, the Union would be forced to take necessary action. The Employer did not respond to this letter, and promptly on August 2, 1955, the Union filed charges with the National Labor Relations Board alleging that the Employer had committed unfair labor practices in violation of various provisions of Section 8 (a) of the Act in entering into the individual contracts with the driver members of the Union.

Subsequently, on September 8, 1955, the Union sent to the Employer proposed amendments to the existing contract which was about to expire. The Employer met with the Union on October 3rd and told it that it would not recognize the Union with respect to the drivers who had signed the individual contracts. It was on that same day that the Company discharged the drivers who had refused to sign the individual contracts.

B. The Proceedings Below

Upon the filing of charges by the Union, a complaint was issued against the Employer alleging in substance that the Employer had by-passed and refused to bargain with the Union by entering into individual contracts of employment with its drivers in violation of Sections 8 (a) (1) and (5) of the Act; that it had failed to give the notices of termination of the contract and abide by its terms as required by Section 8 (d) of the Act; and that it had unlawfully discharged the six drivers who had refused to sign the individual contracts in violation of Sections 8 (a) (1), (3) and (5) of the Act.

Following a hearing the trial examiner found that the Employer had committed the foregoing unfair labor practices and recommended that the Employer restore the status quo by (a) offering to the discharged employees reinstatement with back pay, (b) upon request bargain collectively with the Union as the exclusive representative of all drivers, and (c) notify the drivers with whom the Respondent had made individual contracts that it would no

longer attempt to enforce such contracts, but without prejudice to the assertion by the individuals affected of any legal rights they may have acquired under the contracts. (R. 160.)

On appeal, the Board, while agreeing with the trial examiner's findings of fact, in split decisions rejected certain of his conclusions of law and his recommendations. One member, Chairman Leedom, concluded that the Employer had violated Sections 8 (a) (1) and (5) of the Act by failing to bargain with the union concerning the institution of the independent distributorship plan, but found no 8 (a) (3) violation in the discharge of the six drivers. He found it unnecessary to pass upon whether Section 8 (d) of the Act had been violated. The second member of the three member panel, Abe Murdock, agreed with the conclusions and recommendations of the trial examiner in their entirety. (R.129.) The third member, Stephen Bean, agreed with the Chairman that Section 8 (a) (3) had not been violated but did not pass on the remaining issues, including the 8 (d) issue, because he felt the complaint should have been dismissed in its entirety, there being no affirmative showing that the union in fact represented a majority of the drivers at the time of the alleged unfair labor practices. R.138.

As a result of these conflicting views, the majority order (R. 126) merely directed the Employer to bargain with the Union on the question of whether the independent distributorship system should be *continued*, or, as to any new employees, whether it should be adopted as to them; the order made no attempt to restore the status quo.

Thereafter, the Union filed its Petition to Review the Board's order in the Court below, and the Board filed its Answer to this Petition and its Petition to Enforce as against the Employer Shamrock Dairy, and such Employer was granted permission to intervene. On November 5, 1958, following the submission of briefs and oral argument, the Court below remanded the case to the Board with

orders to make specific findings as to whether the signing of the independent distributorship contractors changed the status of the drivers from employees to independent contractors and whether, in any event, the employer violated Section 8 (d) of the Act, and if so, whether Section 8 (a) (3) was not also violated by the discharge of the six drivers. (R.170.-171.) On February 26, 1959, the Court below enlarged its prior remand by directing the full Board to reconsider the entire case. (R.172.)

On August 13, 1959, the full Board (except member Rogers who had disqualified himself) issued its Decision and Order on Remand. (Supplemental Record.) Although the full Board adopted its former findings of fact, it once again split on the issues, with the result that the specific findings requested by the Court below were not made, a majority not being able to agree on any of them.

Only one member, Chairman Leedom, found that the negotiation of individual distributorship contracts converted the drivers from employees to independent contractors. Two members, Joseph Jenkins and John Fanning (who had replaced former member Murdock) found that the drivers continued their status as employees notwithstanding the signing of the individual contracts. The fourth member, Stephen Bean, again held that the complaint should have been dismissed in its entirety because of its failure to affirmatively establish that the union represented a majority of the drivers at the time of the unfair practices and declined to pass upon the issue of whether the status of the drivers had been changed by the signing of individual contracts and whether Section 8 (d) had been violated.

On the issue of the 8 (d) violation, two of the Board members, Jenkins and Fanning, found such a violation because, during the term of the existing collective agreement, the employer had negotiated the individual contracts with the employees embraced thereunder without having given the notices and observing the contract as required by Section

8 (d). Only the Chairman found no 8 (d) violation, this on the theory that the individual distributorship contracts "were not contracts of employment and the respondent continued in full force and effect the provisions of the collective agreement with respect to those drivers who did not sign the individual contracts." He further concluded that the execution of individual contracts "was not inconsistent with the collective bargaining contract as the individual contracts pertained not to terms or conditions of employment but involved the termination of employment status of the drivers".

On the issue of an 8 (a) (3) violation, the Chairman and member Bean found none to exist, while members Jenkins and Fanning found that the employer had violated that Section by discharging the six drivers.

All of the members, except Bean, who again refrained from passing on the issue, found that the employer had refused to bargain in violation of Section 8 (a) (1) and (5) of the Act. Because this was the only issue on which a majority of the Board could agree, the Board ordered the same limited remedy which it had directed in the original case. Members Jenkins and Fanning were of the view however, that this remedy, even as applicable to the 8 (a) (1) and (5) violations, did not go far enough because it did not abrogate the unlawful individual contracts and failed to restore the *status quo ante* and permitted the Employer to retain the fruits of its unlawful conduct. Accordingly in addition, they would have ordered further remedies based on Section 8 (d) and Section 8 (a) (3) violations.

The petitioner then moved the Court below to modify the order of the National Labor Relations Board as requested in its original petition for review and to enforce that order as so modified. Written memoranda in support of and in opposition to such motion were filed by the parties and thereafter on June 16, 1960, the Court below entered a per curium Order, Judge Washington dissenting, affirming the Board order of August 13, 1959. The majority merely

stated, without discussion, that it was "of the view that the drivers ceased to be employees and became independent contractors when they signed contracts for distributorship; that the six drivers who did not sign as distributors should not be reinstated because their discharge was the result of a "reduction in force;" and that, although Shamrock Dairy, Inc., technically violated the Act in failing to give the Union an opportunity to discuss the independent distributors' plan, the court concludes that the order of the Board entered in this proceeding on August 13, 1959, should be and it is affirmed."

In his dissent Judge Washington found an obvious and unremedied 8 (d) violation in addition to the "technical" violation of Section 8 (a) (5), and also an 8 (a) (3) violation even though it be assumed that the status of the drivers had been changed from employees to independent contractors, and he further found that such status had not been changed under common law tests and particularly not under considerations of Taft-Hartley policy which require any possible doubt to be resolved in favor of maintaining existing protections of employees rights and avoidance of possible industrial discord.

The judgment of the Court below was entered on June 16, 1960 and appears at R. 173-187, its decree has not yet been entered.

REASONS FOR GRANTING THE WRIT

This case involves important questions of the application and administration of the National Labor Relations Act as amended, which have not been but should be settled by this Court, and also possible conflict with prior decisions of this Court. The Board has failed to apply or enforce an important portion of the Act (Sec 8 (d)) in a context which has not heretofore been considered by this Court. Although finding various violations of the Act by the employer, the Board has failed to grant the relief which such violations

call for under applicable decisions of this Court. Finally it has failed to resolve an issue—that of the status of the delivery drivers as employees under the Act—which issue this Court has decreed is its duty to resolve.

A.

For the first time there has been brought to this Court's attention the issue of the appropriate application and enforcement of the requirements of Section 8 (d) that notices of contract modification or termination be given and existing agreements observed until their termination. In the face of admitted failure by the Employer to observe those requirements and the extreme damage thereby inflicted on the Union, the Board has taken no steps whatsoever either to make such violations the subject of a cease and desist order or to afford petitioner relief from the effects of such violations. A majority of the Court below did not discuss the issue, and only this Court can require the Board to give effect to the mandatory provisions of that Section and enforce the Act as written. Further, as will be seen, the Board has failed to afford adequate relief in other respects when it left the decimated Union to bargain concerning whether the Employer should retain the fruits of its unfair labor practices. Even as to the limited violations of the Act it did find that the Employer had committed, the Board paid no heed to the admonition of this Court in *NLRB* v. *District 50, UMW*, 355 U.S. 453 that the Board's undoubted discretion to frame orders remedying unfair labor practices is limited by the requirements that such orders for redress must (1) "effectuate the policies of the Act", (2) "be appropriate" under the total circumstances, and (3) "be adapted to the situation which calls for redress."

B.

An additional issue of national importance and affecting large segments of American industry is present in this case. One member of the Board, and two members of the

Court below but without discussion, have concluded that the signing by the drivers of the individual distributorship contracts converted their status from that of "employee" to that of "independent contractor," as those terms are used in Section 2(3) of the Act as amended in 1947. While this amendment was made to "correct" this Court's decision in the Hearst Case (*NLRB* v. *Hearst Publications* 322 U.S. 111), nevertheless, as pointed out by Judge Washington in his dissent, that amendment sought only to require that common law tests of the employee relationship be used rather than administrative expertise, and the amendment did not seek or have the effect of overturning the canon of construction laid down by this Court in that case when it said (Id. at 129): "Where all the conditions of the relationship require protection, protection ought to be given." In this case the trial examiner and all Members of the Board who considered the question, save one, concluded that the employee relationship had not been terminated by the signing of the individual contracts, and Counsel for the Board in arguing the issue below contended only that there was a "reasonable basis" in the evidence for the conclusion that the employee relationship had been terminated. This Court admonished in Hearst that where, under the same facts and using the same common law tests, opposing conclusions can reasonably be drawn, the policy of the Act to afford protection where required should be effectuated by finding an employee relationship. In this case, as in the case of many thousands of other delivery employees, to deny an employee relationship by the simple device of individual "distributorship contracts" is to deprive such employees of all benefits of organization and collective bargaining even though their duties, responsibilities and employer controls remain the same. If employers in the milk industry, in the bread industry, in the beer or beverage industry, or in other industries where the distribution of the product to the individual customer is an integral part of the business, are to be permitted by that device to avoid their collective

bargaining obligations and deprive their driver employees of the right of self-organization, many thousands of employees throughout the country will find themselves without the benefits of the Act's much needed protections.

C.

The first issue in this case concerns the propriety and adequacy of the Board's remedial order entered against the Employer herein, particularly in view of the requirements of Section 8(d) of the Act and the effect on petitioner of the failure of the employer to follow those requirements as well as the requirements of Section 8(a)(5). It is not controverted by Counsel for the Board and it is implicit in the Board's decision that had a majority of the Board been able to conclude that the drivers had retained their employee status notwithstanding the signing of the individual agreements, the Board would have been obliged to grant the additional relief requested below; accordingly, a resolution of that issue in petitioner's favor would dispose of the issue of the adequacy of the Board's order. It would seem clear, however, that regardless of how the employment status issue is resolved, the relief requested by petitioner should have been granted upon the undisputed facts in this case, and that in failing to order such relief, the Board and the majority below have disregarded the mandate of this Court in the *District 50* case, supra, that the Board's remedial orders must be appropriately adapted to the situation calling for redress as well as effectuate the policies of the Act.

What is the situation calling for redress? By virtue of its 8(a)(5) violation alone and its failure to meet and discuss with petitioner prior to forcing the individual distributorship plans upon its employees, the employer herein has decimated the Union as a collective bargaining representative; when the remaining six who refused to sign were discharged, the Union became a mere shell. Yet the Board's only remedy for the employer's initial failure to bargain was to require the Employer to bargain with this shell as

to whether the individual contracts should be continued as to old employees or should be adopted as to any new employees. Had there been proper bargaining when the Union had its full membership, it may well have been, for all the Board or anyone else can know, that the individual contracts would never have been entered into. This is particularly true in view of the clause in the existing collective agreement under which the Employer had pledged that it would not require any individual employee to make any verbal or written contract which would in any way conflict with the collective agreement. It is the usual function of remedial orders at least to place the parties in the status quo which existed prior to the wrongdoing, and certainly it is not the function of such orders to permit the wrongdoer to retain the fruits of the unlawful activities while placing the injured party in a less favorable position than before—here an impossible position. As stated by Board Member Murdock dissenting in the original Board proceedings:

> "Instead of purging the unfair labor practice the order merely tell the Respondent to bargain as to whether it should be purged. It is naive to think that any effective bargaining can take place at a table where the Respondent is permitted to sit holding the fruits of its unfair labor practices and need only discuss whether it should give them up."

D.

The foregoing considerations are applicable even though the employer's 8(a)(5) violation alone is taken into account. But we have here additional violations which are totally ignored and unremedied. Section 8(d) of the Acts sets forth in mandatory language that no party to a collective agreement shall terminate or modify that agreement without giving a 60-day notice to the other party. Section 8(d) further provides mandatorily that after giving such notice, the noticing party shall continue the agreement in full

force and effect without lockouts until the expiration of the contract. None of this was done: the employer completely ignored the requirements of Section 8 (d) and in addition his contractual obligation that he not require any of his employees to make any individual contract in conflict with the collective contract. The purpose of Congress in imposing the 8 (d) requirements (see 80th Cong., 1st Sess., Sen. Rep. No. 105, p. 24, and H. Conf. Rep. No. 510, pp. 34-35) was to oblige all parties to existing agreements to resort to the processes of collective bargaining to resolve not only any differences over wages and working conditions, but also differences over terminations of such agreements, and to maintain them for their term rather than resort to the disruption of strikes or lockouts. Yet, the Board's Chairman, the only Board member to find no 8 (d) violation, and the Court below which did not pass on the issue, completely ignored this blatant violation and the disastrous effect of such violation upon petitioner and took no steps either to prevent its repetition or to remedy its effects.

The Chairman found no 8(d) violation on the ground that the signing of the individual contracts terminated the employee relationship just as would a discharge, and that therefore no change could be said to have been made in the wages or working conditions, nor was there any contract termination, the contract continuing as to those who didn't sign. Nothing could be more unrealistic than this reasoning. As is clear from the undisputed facts and, as found by the Trial Examiner, the two Board members who did pass on the issue, and Judge Washington below, the drivers continued to perform the same services with respect to Shamrock products as they had before—their essential economic function remained the same. But, as will be briefly adverted to later, their compensation, hours and working conditions were vitally effected by the signing of the individual distributorship contracts; as stated by Judge Washington below: "Through these contracts the drivers

are economically tied to Shamrock as effectively as any man working on a wage, piece rate or commission basis," and economically are placed "at the mercy of Shamrock." See in addition the recent decision of this Court in *Local #24* v. *Oliver*, 358 U.S. 283 (January, 1959) in which this Court discussed the economic relationship between employers and drivers operating on a lease basis. Furthermore, whatever else the signing of the individual contracts and the discharge of the drivers who didn't sign may have accomplished, it certainly accomplished a termination for all practical purposes of the collective agreement, including a disregard of the clause obligating the employer to refrain from doing exactly what he did do—sign the employees to individual contracts. Thus, the very subjects which Section 8(d) sought to protect were ignored. Surely an 8(d) violation should have been found and a remedy directed alleviating the effects of the violation and redressing the injured party. Congress framed Section 8(d) in terms of duty, not in terms of reminder. But for the disregard of its provisions, the individual contracts would never have been negotiated and the employee relationship would not have been altered—certainly not until the end of the contracts, and for all the Board can know, at any time in the future.

E.

The redress to be effected should include not only abrogation of the individual contracts, but also reinstatement of the six discharged drivers. This could be done even though there was no direct evidence of an intent to discriminate against them because of their union membership. Whatever may be concluded from the record in that particular, it is nevertheless perfectly clear that the drivers were discharged solely because they had refused to engage in individual bargaining with their employer at a time when they were still employees, at a time when they were represented by a duly selected collective bargaining agent, and at a time when they were beneficiaries of a contract

which provided that they shall not be required to make any contract in conflict with their collective agreement. One of the key protections in Section 7 is that of the right of employees 'to bargain collectively through representatives of their own choosing.' If, while still employees and still presumably entitled to the protections of the Act, they can legally be coerced by threat of discharge or promise of benefit to engage in individual bargaining, this right to engage in collective bargaining through a union representative obviously becomes meaningless. And, in addition to the disregard of that protection which will be effected if the discharges in the present case are condoned, there is the additional factor, as noted by Member Murdock, that thereby 'the employer undeniably discourages membership in the union which the employees have selected', so that the discharges would be discriminatory and in direct violation of Section 8(a) (3) of the Act."

Thus, reinstatement could be ordered either on an 8(a) (3) theory, on an 8(d) theory, or on an 8(a) (5) theory, as the Board has done on other case. See *In the Matter of West Boylston Mfg. Co.*, 87 NLRB 808.

F.

The Court below and the Board's Chairman, the one member so holding, erred in their conclusion that the signing of the individual contracts converted the drivers from employees to independent contractors as those terms are used in Section 2 (3) of the Act,[1] and in so doing ignored the important rule of construction announced by

[1] It is significant that the state court of Arizona (Shamrock Dairy v. Teamsters Local Ariz. Super. Ct., Pima County, Case No. 46,492, Sept. 1955, reported in 36 LRRM 2748) specifically held that notwithstanding the signing of the individual contracts the Shamrock's drivers remained employees. Further, as noted by the trial examiner herein (R. 944), the Arizona Employment Security Commission has tentatively ruled that Shamrock's drivers remain employees.

this Court in *NLRB* v. *Hearst Publications Inc.*, supra, that doubts in this area be resolved in favor of retaining the employee status. We have seen that this issue is an important one, affecting many thousands of similarly situated delivery drivers throughout the country.

The facts are not in dispute, and, since the 1947 amendments, to Section 2 (3), the issue is one of law. See discussion on this point by Judge Washington in his dissent. Since the right to control is the determining factor (*NLRB* v. *Nu-Car Carriers Inc.* 189 F.2d 756 (C.A.3); *Radio City Music Hall Corp.* v. *U.S.* 135 F.2d 715 (C.A. 2)), the terms of the individual contracts are controlling. Under these individual agreements, the Employer, while allegedly selling both the delivery trucks and the delivery routes to the drivers, nevertheless obtained to a substantial legal degree most of its former controls over the manner and means of making milk deliveries and to a practical degree all of them. The Employer retained the absolute right to repurchase the trucks and routes at a pre-established price at any time that it may unilaterally and in its complete discretion so determine. The cases generally hold that this element alone "tends strongly to show that the person employed is not an individual contractor" (27 Am. Jur. 501, Sec. 21). But here we have not only the power of unilateral termination of the agreement reserved in the employer, but also, in the interval before he exercises such right, the company has reserved to itself the further rights to determine the size of territory, the time of pickup and delivery of products, the approval of insurance contracts, the payment of incentive money awards for additional customers, the right to instruct the drivers to serve any customer, and the right to determine the manner and means by which they wish the customer served by the enforcement of the "high standards established, followed and maintained" by the company, the

right to determine the type of helper whom they would permit the drivers to engage, the right unilaterally to appoint substitutes for the drivers and to fix their compensation, and the right unilaterally to determine the time and place at which individual services are to be performed. Even more important, in terms of the Employer's control over the drivers compensation, was the power of the Employer to establish prices at which milk is to be bought from the dairy by the dri ers and to suggest "the prices at which the drivers can sell the milk". In view of the Employers absolute right to reacquire the delivery routes his "suggestions" could have the force of law.

The trial examiner herein, three Board members, Judge Washington below, and the Arizona courts concluded that not only were the drivers not independent contractors but as employees were in a more subservient position under the individual contract than they had been before. Since it can fairly be concluded as a matter of law that the drivers remain employees, "the consequences which may flow from denying employee status demonstrate that, absent facts which clearly show independent contractor or employee status at common law, special considerations relevant to Taft-Hartley must be determinative. Independent contractors have limited legal protection if they attempt to organize, bargain collectively, or otherwise control their income through concerted action. . . . . In addition, other persons engaged as employees by competitors of a principal whose agents are in the independent contractor category may find their principal's profits, and consequently their wages, undercut by price competition from the "independent" agents. In short, a determination of independent contractor status does not merely affect the union as an organizational entity, but affects all persons who perform functions economically similar to those performed by persons represented by the union." Judge Washington dissenting below.

CONCLUSION

It is respectfully submitted that for the reasons asserted above this petition for a writ of certiorari should be granted.

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APPENDIX A

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14,357

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, LOCAL UNION No. 310, PETITIONER,

v.

THE NATIONAL LABOR RELATIONS BOARD, RESPONDENT, SHAMROCK DAIRY, INC., INTERVENOR

No. 14,411

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

SHAMROCK DAIRY, INC., RESPONDENT

On Petition to Review and Set Aside, and on Request for Enforcement of, an Order of the National Labor Relations Board

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Filed June 16, 1960

Mr. Herbert S. Thatcher was on the pleadings for petitioner in No. 14,357.

Messrs. Thomas J. McDermott, Associate General Counsel, National Labor Relations Board, *Marcel Mallet-Prevost*, Assistant General Counsel, National Labor Rela-

tions Board, and *Melvin Pollack*, Attorney, National Labor Relations Board, were on the pleadings for respondent in No. 14,357 and petitioner in No. 14,411.

Messrs. Arthur M. Kuhl, Richard G. Kleindienst and *Gerard D. Reilly* were on the pleadings for intervenor in No. 14,357 and respondent in No. 14,411.

Before WILBUR K. MILLER, WASHINGTON and BURGER, Circuit Judges.

ORDER

PER CURIAM: These cases came on for hearing and were remanded to the Board for further proceedings and are now before us on the motion of petitioner in case No. 14,357 for modification of the decree of the National Labor Relations Board and for enforcement of the decree as modified, on the opposition of Shamrock Dairy, Inc., of the reply of the Board to the petitioner's motion, on the petitioner's response to the reply of the Board and on the response of Shamrock Dairy, Inc., to the Board's reply.

Having considered all the foregoing pleadings, and being of the view that the drivers ceased to be employees and became independent contractors when they signed contracts for distributorship; that the six drivers who did not sign as distributors should not be reinstated because their discharge was the result of a "reduction in force;" and that, although Shamrock Dairy, Inc., technically violated the Act in failing to give the Union an opportunity to discuss the independent distributors' plan, the court concludes that the order of the Board entered in this proceeding on August 13, 1959, should be and it is affirmed. Counsel for the Board are directed to present within ten days a proposed enforcement decree.

WASHINGTON, *Circuit Judge*, dissenting: This is a petition to review and modify an order of the National Labor

Relations Board, reported at 119 N.L.R.B. 998 (1957). As the facts are fully set forth in that report, they need not be repeated in detail here. Briefly, Shamrock Dairy had a collective bargaining agreement with the petitioner union, which represented Shamrock's milk-truck drivers. Shamrock notified the drivers that it would sell its trucks and routes to the drivers, who would then become "independent contractors." It did not bargain with the union before instituting this plan. The union filed a charge, and the General Counsel of the Board issued a complaint. After further proceedings, the Board issued an order requiring Shamrock to cease and desist from (1) refusing to bargain collectively with petitioner with respect to "adoption or continuance of a system of product distribution known as the independent distributorship plan insofar as it affects the *tenure* of its employees," (2) entering into any new independent distributorship contract before bargaining with petitioner, and (3) "in any like or similar manner interfering with, restraining or coercing its employees in the exercise" of their rights under Section 7 of the Taft-Hartley Act.[1] (Emphasis added).

Petitioner union asks that the order be modified so as to reinstate certain drivers who were discharged when they failed to agree to the so-called "independent distributorship plan," that all existing contracts with other drivers be invalidated, and that Shamrock be ordered to bargain with respect to all terms and conditions of employment, not merely tenure. In support of these requests, petitioner maintains that Shamrock violated Sections 8(a)(1), (3) and (5), and 8(d) of the Taft-Hartley Act by adopting the distributorship plan without first bargaining with the union and by discharging the drivers for refusal to sign the individual distributorship contracts. Petitioner asserts that, in failing to invalidate existing contracts, order bargaining on all issues, and reinstate the discharged drivers, the

[1] 61 Stat. 140, 29 U.S.C. § 157 (1958).

Board has not restored the status quo. The Board responds that to abrogate the existing contracts will not effectuate the policies of the Taft-Hartley Act because Shamrock adopted the independent distributorship plan in the honest belief that the question whether the drivers should have "employee" or "independent contractor" status was one for the individual drivers to determine. Thus, it says, only a technical violation of Section 8(d)(5) was involved rather than a violation of Section 8(d). In addition, the Board maintains that the employees for whom petitioner seeks reinstatement were discharged "for valid economic reasons": Sections 8(a)(1) and (3) were not thereby violated. The Board asserts that since there was a "reasonable basis" for finding the drivers to be independent contractors rather than employees, this finding cannot be challenged.

The ultimate question is whether or not the Board's order effectuates the purposes of the Taft-Hartley Act. This depends in turn on whether or not the Board correctly ascertained the extent to which any provision of the Taft-Hartley Act had been violated, and Section 8(d) in particular. Section 8(d) specifies certain bargaining prerequisites where "wages, hours, and other terms and conditions of employment" are concerned.[2] In considering whether or not Shamrock Dairy's acts involved "wages, hours, and other terms and conditions of employment," the

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[2] Section 8(d) provides in pertinent part:

"(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reach if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided*, That where there is in effect a collective-bargaining contract, employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or

Board thought it necessary to determine whether the status of the drivers was changed from "employees" to "independent contractors."

The members of the Board were not in agreement on either the status question or the Section 8(d) question. On the status point, Chairman Leedom was of the view that "the individual contracts pertained not to terms or conditions of employment but involved the termination of the employment status . . . and substitution therefor of the status of independent contractor." Decision and Order on Remand, p. 5. From this the Chairman concluded that Section 8(d) was not violated, and that it was not necessary to invalidate the independent distributorship contracts. Chairman Leedom cited two cases supporting his position: *Sloan* v. *Journal Publishing Co.*, 213 Ore. 324, 324 P.2d 449 (1958), and *Adams Dairy Co.* v. *Dairy Employees Union*, 363 Mo. 182, 250 S.W.2d 481 (1952). The theory underlying these two cases is that

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modify such contract, unless the party desiring such termination or modification—

"(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

"(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

"(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

"(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later. . . ."

the employer, in deciding to perform his work through independent contractors, is merely exercising his right to hire and fire,[3] and is not taking action affecting wages, hours, and terms and conditions of employment. Members Fanning and Jenkins, on the other hand, concluded that employee status was not lost, pointing to those aspects of the new contracts which deal with earnings and hours.

Certainly, it is clear that the new contracts deal with economic questions going far beyond "tenure," if tenure is used to express the duration of a functional, economic relationship rather than a legal relationship. The driver-salesmen continued to perform services with respect to Shamrock products under the distributorship plan—serv-

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[3] In *Adams Dairy*, the Dairy had discharged its old drivers and contracted with new drivers for the sale of trucks and delivery of milk under terms not unlike those in Shamrock. The Dairy sought an injunction to prevent the union from striking and picketing in protest to these contracts and discharges. The union defended on the ground that the Dairy had breached its collective bargaining agreement, which provided that "any major changes in the present working conditions or rules must be mutually agreed to by the Union employees, and Employer. . . ." The court held that these new contracts did not involve terms and conditions of employment and thus did not violate the collective bargaining agreement clause forbidding the employer to request employees to make contracts inconsistent with the collective agreement.

In Sloan v. Journal Publishing Co., 69 indpendent newspaper distributors sought to enjoin the Journal Publishing Company, under pressure from the American Newspaper Guild, from discontinuing a recently instituted independent distributorship plan.[3] On request from distributor-employees, the Journal had entered into an agreement whereby the distributors earned their income by purchase and resale instead of wages and commissions. The Guild, which was also a defendent, answered that the distributorship plan was adopted in violation of a pre-existing collective bargaining agreement and that discontinuance of the plan merely constituted a decision to cease breaching the collective agreement. The court held that the independent plan did not breach the collective agreement because the Journal had simply exercised "one of the traditional and fundamental rights of management to decide *for itself* whether to perform its functions by employees or by independent contracts. . . . ." 324 P.2d at 458. Since the court found that this right had not been expressly waived in the collective agreement, the Guild's defense was unavailing.

ices of a nature much the same as in the past. In fact, the essential economic function that these men performed was not different before or after institution of the distributorship system. But very great changes were made in their relations with Shamrock—changes which in my view were "with respect to wages, hours, and other terms and conditions of employment" within the meaning of Section 8(d).

Economically, the new contracts place the drivers at the mercy of Shamrock. Wholesale prices are set by Shamrock. Shamrock can unilaterally terminate any driver's milk contract, on which he must primarily depend. Collective and even individual bargaining is practically precluded because the drivers have agreed not to work for another dairy for two years. Thus, the drivers cannot use their good will as a bargaining weapon against the supplier. The Dairy can reap all good will for itself. Nor are a driver's capital assets of bargaining significance because Shamrock has a re-purchase option on each truck. Price competition on the retail level is unfeasible also because (1) the drivers sell under "recommended" prices from Shamrock—a recommendation enforcible through Shamrock's power of unilateral termination, and (2) retail prices are set in a broad market of which each individual driver forms a relatively insignificant part. Despite the fact that the drivers may carry other products and sell advertising on their vehicles, these cannot be significant factors over which the drivers exercise primary control because (1) in case of conflict with Shamrock, Shamrock may unilaterally terminate the milk contract, and (2) Shamrock may re-purchase the trucks at any time. The drivers cannot extend the geographic confines of their retail markets; thus, Shamrock can effectively control the size of the drivers' labor force. And certainly it cannot be said that an individual driver has any control over the price he pays for gasoline and insurance or over his taxes—the primary costs of the driver. *Through these*

contracts, the drivers are economically tied to Shamrock as effectively as any man working on a wage, piece-rate, or commission basis.

How can it possibly be said, in view of these facts, that the new contracts did not change "wages, hours, and other terms and conditions of employment"? Even assuming, arguendo, that the drivers became for some purposes "independent contracts," this does not excuse the Board from recognizing the practical effects of Shamrock's unilateral acts, which in fact changed wages, hours and many other aspects of the former system. Since Shamrock made these changes without complying with Section 8(d), a violation of that section occurred.

Council for the Board says, on brief, that an independent contractor relationship exists because there is a reasonable basis for this conclusion in the evidence, and the Board found such a relationship, precluding a finding that Section 8(d) was violated. On remand,[4] only one Board member out of four found an independent contractor status, two found that the driver-salesmen retained their employee status, and the fourth made no finding. The order was framed as if all agreed with Chairman Leedom that a change of status occurred. This split among the members of the Board does not prevent this court from deciding the issue of status. Status is not a question of fact under the Taft-Hartley Act,[5] nor does counsel for the Board assert that it is. The issue is one of law, and where the Board has an opportunity to make a specific finding, but fails to do so, this court should make an independent determination.

In determining status, the Board and the courts must construe the term "employee" to effectuate the purposes

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[4] We remanded the case to the Board, after hearing argument, to give it an opportunity to clarify its findings. It was unable to do so. The text of the decision and order on remand appears at 124 N.L.R.B. No. 63.

[5] See the remarks of Senator Taft and the legislative history of Section 2(3), recited *infra*.

of the Taft-Hartley Act, so long as a departure is not made from the common law standard of "right of control." Where either an independent contractor or an employee status can be regarded as reasonable conclusions from the facts, the Board and the courts are obliged to determine that the employee status exists. First, our duty to effectuate the purposes of the Act was manifested in *National Labor Relations Board* v. *Hearst Publications*, 322 U.S. 111, 120-30 (1944). The Supreme Court there said "'Where all the conditions of the relation require protection, protection ought to be given.'" [Citing *Lehigh Valley Coal Co.* v. *Yensavage*, 218 Fed. 547, 552 (2d Cir. 1914)] *Id.* at 129. This canon of construction has not been vitiated by the Taft-Hartley Act. Section 2(3) of Taft-Hartley provides: "The term 'employee' shall include any employee . . . but shall not include . . . any individual having the status of an independent contractor. . . ."[6] The legislative history of Taft-Hartley indicates that independent contractors were specifically excluded from the term "employee" because of other aspects of the *Hearst* opinion. In *Hearst*, the Court had reasoned that common law concepts were irrelevant to a definition of "employee" and that the courts were obliged to sustain any finding of the Board which had "'warrant in the record' and a reasonable basis in law." *Hearst, supra*, at 131. The Court treated the Board's finding of employee status as a finding of fact, and it is this element of *Hearst* to which Taft-Hartley addressed itself primarily. Senator Taft explained Section 2(3)'s reference to independent contractors in the following terms:

> "The legal effect of the amendment therefore is merely to make it clear that the question whether or not a person is an employee is always a question of law since the term is not meant to embrace persons outside that category under general principles of the law of agency." 93 CONG. REC. 6441-42 (1947).

[6] 61 Stat. 137, 29 U.S.C. § 152(3).

This remark was made with reference to the bill which was reported from conference and became law. The bill which passed the Senate had not contained any reference to independent contractors, but it is clear that Senator Taft's interpretation is a fair representation of the intent of those in the House who supported this language. The House Conference Report stated that the difficulty that was found with *Hearst* was "that the ordinary tests of the law of agency could be ignored by the Board in determining whether or not particular occupational groups were 'employees' within the meaning of the Labor Act." Conference Report, H.R. Rep. No. 510, 80th Cong., 1st Sess. 32-33 (1947). In the original House report, the majority of the Labor Committee had more fully expressed their dissatisfaction with *Hearst*, and emphasized that in their view the Supreme Court had improperly given the Board a free hand. In particular, the House Report objected that in *Hearst* the "employees" had employees of their own. Thus it stated:

> "An 'employee', according to all standard dictionaries, according to the law as the courts have stated it, and according to the understanding of almost everyone, with the exception of members of the National Labor Relations Board, means someone who works for another for hire. But in the case of *National Labor Relations Board* v. *Hearst Publications, Inc.* (322 U.S. 111 (1944)), the Board expanded the definition of the term 'employee' beyond anything that it ever had included before, and the Supreme Court, relying upon the theoretic 'expertness' of the Board, upheld the Board. In this case the Board held independent merchants who bought newspapers from the publisher and hired people to sell them to be 'employees'. The people the merchants hired to sell the papers were 'employees' of the merchants, but holding the merchants to be 'employees' of the publisher of the papers was most far reaching. It must be presumed that when Congress passed the Labor Act, it intended words it used to have the meanings that they had when Congress passed the

act, not new meanings that, 9 years later, the Labor Board might think up. In the law, there always has been a difference, and a big difference, between 'employees' and 'independent contractors'. 'Employees' work for wages or salaries under direct supervision. 'Independent contractors' undertake to do a job for a price, decide how the work will be done, usually hire others to do the work, and depend for their income not upon wages, but upon the difference between what they pay for goods, materials, and labor and what they received for the end result, that is, upon profits. It is inconceivable that Congress, when it passed the act, authorized the Board to give to every word in the act whatever meaning it wished. On the contrary, Congress intended then, and it intends now, that the Board give to words not farfetched meanings but ordinary meanings. To correct what the Board has done, and what the Supreme Court, putting misplaced reliance upon the Board's expertness, has approved, the bill excludes 'independent contractors' from the definition of 'employee'." Legislative History of Labor Management Relations Act, Vol. 1, p. 309 (1947).

I think Taft-Hartley goes no further than to assure that, as Senator Taft stated, "the *general principles*" of the law of agency will be considered. It does not make tort law the exclusive standard. This conclusion is buttressed by the fact that no objection was raised in the Committee Reports to *National Labor Relations Board* v. *E. C. Atkins & Co.*, 331 U.S. 398 (1947), which reiterated the *Hearst* policy with respect to effectuating the policies of the Act.

Accordingly, I believe that even though the right of control is now an essential consideration in determining whether or not a person has "employee" status, the Board and the courts must consider other factors. Certainly where conflicting inferences can be drawn from the facts, so as to support either a conclusion of employee or independent contractor status by the common law "right of control" test, considerations of Taft-Hartley policy should be persuasive.

The consequences which may flow from denying employee status demonstrate that, absent facts which clearly show independent contractor or employee status at common law, special considerations relevant to Taft-Hartley must be determinative. Independent contractors have limited legal protection if they attempt to organize, bargain collectively, or otherwise control their income through concerted action. An employer will not be obliged to bargain collectively with them, and if they act in concert to control their income by fixing resale prices they may be subject to Sherman Act prosecution. See Note, 67 YALE L.J. 98-100 (1957). Moreover, a determination in a Taft-Hartley case that certain agents are independent contractors might be persuasive in a proceeding by the principal to circumvent the Norris-La-Guardia Act and enjoin particular actions by those agents. And it may be to the principal's disadvantage that its "agents" are not employees, for picketing by organized, independent "agents" may be outside Section 8(b)(4). See *Chauffeurs Union*, 116 N.L.R.B. 955 (1956). In addition, other persons engaged as employees by competitors of a principal whose agents are in the independent contractor category may find their principal's profits, and consequently their wages, undercut by price competition from the "independent" agents. In short, a determination of independent contractor status does not merely affect the union as an organizational entity, but affects all persons who perform functions economically similar to those performed by persons represented by the union. Since discontent among these "agents" who are economically similarly situated may create friction among themselves and with those upon whom they are economically dependent, it is essential in the interest of industrial peace that all factors relevant to Taft-Hartley policy be considered, as well as the "right of control."

Particularly relevant to Taft-Hartley's objective of preserving industrial peace is the "agent's" ability substantially to control his net income by virtue of his bargaining

power in any of the particular markets in which he is involved. If a particular "agent" lacks bargaining power with respect to his principal suppliers, it is important to industrial peace that he at least be able to control his net income by reducing his costs, or increasing his retail price. As we have seen, Shamrock's drivers are practically impotent in these respects. Thus, I believe these driver-salesmen remain "employees" within the meaning of Taft-Hartley.

Furthermore, apart from special Taft-Hartley considerations, I think the drivers are still employees, even under the "right of control" test used at common law. Counsel for the Board and for the union both accept the statement of Judge Learned Hand in *Radio City Music Hall Corp. v. United States*, 135 F.2d 715, 717 (2d Cir. 1943), that "The test lies in the degree to which the principal may intervene to control the details of the agent's performance; and that in the end is all that can be said . . . ." It is interesting to note that Judge Hand used this definition to deny employee status under the Social Security Act to actors—a group which now benefits from Taft-Hartley protection. Nevertheless, the petitioner union has accepted Judge Hand's definition and demonstrated, convincingly, I think, that the drivers have not lost their employee status even by this definition. Control by Shamrock of the details of their performance on the job is all pervasive. In fact, counsel for the Board does not assert flatly that the salesmen-drivers are independent contractors, but that the Board had *a reasonable basis* for so finding. The Board is, by that argument, trying to resurrect the very portion of *Hearst* at which the Taft-Hartley amendment was most certainly aimed—the policy of viewing status as a question of fact, subject only to limited review.

Since the drivers have not lost their status as employees, their tenure has not been affected. The new contracts relate to terms and conditions of employment. These con-

tracts were entered into without the 60-day notice required by Section 8(d) and in violation of an express provision of the existing collective bargaining agreement that employees would not be asked to sign contracts in conflict with the collective agreement. Section 8(d) has been violated. Accordingly, I think Shamrock should be deprived of the fruit of the violation: the individual contracts should be invalidated.

The discharged employees should also have been reinstated. The Board found as a fact that these employees were not discharged to discourage union membership. Be that as it may, these men had a right to refuse the independent distributorship contracts because the contracts were not entered into pursuant to a collective bargaining agreement or after the breakdown of good faith collective bargaining. See *Medo Photo Supply Corp.* v. *National Labor Relations Board*, 321 U.S. 678, 683 (1944); *Lion Oil Co.* v. *National Labor Relations Board*, 245 F.2d 376, 379 (8th Cir. 1957). Individual bargaining under these circumstances violates Sections 8(a)(1) and 8(a)(5).

For these reasons, I would remand the case to the Board for further proceedings not inconsistent with the foregoing.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 404

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, LOCAL UNION NO. 310, *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*
and
SHAMROCK DAIRY, INC., *Respondent*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia

BRIEF FOR THE RESPONDENT SHAMROCK DAIRY, INC., IN OPPOSITION

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BRIEF FOR THE RESPONDENT SHAMROCK DAIRY, INC., IN OPPOSITION

STATEMENT

In its brief in opposition, the Board has summarized the findings, conclusion and order of the Board and the basic question presented herein. While this summary is correct, it omits some pertinent facts which show that Petitioner's statement of the case is inaccurate in certain important respects.

At a series of meetings commencing July 12, 1955, the Intervenor (referred to herein as the Company) informed its drivers that it had under consideration a plan whereby it would sell its trucks and routes to persons who would operate them on an individual distributorship basis (J.A. 112, 148, 62). Details of the plan were explained, and the drivers were invited to take advantage of an opportunity to make greater earnings as independent businessmen (J.A. 62). Upon learning of this, the Union business agent called a meeting of the Company drivers on July 17, and advised them to take the proposed independent contractor agreements to their own attorneys and statisticians and decide for themselves whether to accept (J.A. 5).

Such action is hardly consistent with the Union's statement to this Court (Pet. p. 6) that the employees were coerced by "threat of discharge on the one hand and promise of benefit on the other". Indeed, on July 20 the Company expressly notified those of its drivers who were reluctant to enter into the proposed agreements that such action was optional, and that if they did not wish to sign, they would continue their employment under the provisions of the existing union contract (J.A. 108). Moreover, on the previous evening the Union business agent had again urged that the drivers consult with their attorneys concerning the desirability of the proposals.

Contrary to Petitioner's assertion (Pet. p. 6) that the Union, upon learning of the proposals, immediately protested, it was not until July 29, 1955 that the Union notified the Company that its signing of individual contracts with the drivers constituted a breach of the collective agreement (J.A. 113, 148-9). During the interval between the Company's proposal and the

Union's protest, the business agent had spoken to Company representatives without raising any such issue. Only after some 20 drivers had accepted the Company's offer did the Union raise any objection.

All but six of the Company's drivers accepted the Company's offer (J.A. 113, 118). Those six were permitted to work under the terms of the collective bargaining agreement until its expiration on October 1, 1953. It was not until October 3, that their employment was terminated (J.A. 113-114, 150).

The adoption of the distributorship contracts brought about substantial changes in the relationship between the Company and its former employees.

The manner of servicing the routes was considerably transformed. During the period in which the truck drivers were employees, the Company supervisors had laid-out routes and changed routes and territories (J.A. 66; 120, 151), recommended promotions and dismissals (J.A. 66), required a certain number of calls per day as well as solicitation of new routes (J.A. 9, 120, 151), and determined the order of stops along the route (J.A. 33). Under the individual distributorships, the contractor was controlled in none of these matters. He fixed his own hours of work, including starting time and finishing time, determined the order in which he would service his route, and solicited new business only if and when he so chose (J.A. 32, 120, 151). Distributors solicited new business by such devices as the distribution of calendars, recipes and pens (J.A. 33, 52-55, 110).

Before the changeover, the Company paid the expenses of maintaining and insuring the trucks. It did not permit its drivers to carry riders, and insisted

that the trucks be returned to Company premises at the end of the day (J.A. 10, 18). The distributors maintained their own trucks and paid insurance (J.A. 16-18, 120, 152). Some put their own names on the trucks and used them for their personal convenience, housing them in their private garages (J.A. 10, 18, 24-5). They purchased their own advertising media and used the trucks to sell products that the Company did not handle, such as ice cream, oleomargarine, hams and turkeys (J.A. 48, 55, 59, 120, 152).

Before the establishment of the distributorships employees were guaranteed a certain salary and were also paid commissions on sales. Thereafter, they purchased their own commodities at one price, sold them at a higher price, deducted the expenses of the operation, paid themselves a salary and counted the balance as their profit margin. In short, their compensation was based upon the differential between the cost to them of their product and the sales price at which they sold it. Of significance is the fact that some distributors sold their products at prices other than the standard industry price (J.A. 49, 56, 57, 120).

The collection of accounts was altered by the new method of distribution. Previously customers paid their bills to the Company and the Company determined whether or not to extend credit (J.A. 20, 35). Subsequently, the distributors received payment directly, made determinations with respect to the extension of credit, and in one case, even sued a delinquent customer (J.A. 20, 35, 54).

Distributors employed bookkeepers and kept profit and loss accountings, as well as maintenance of business, bank and checking accounts. They paid their own sales taxes, procured their own peddler's licenses,

and carried their own liability insurance (J.A. 12, 13, 46, 152). Once the Company adopted the distributorship system, it no longer carried the distributors on its payroll records. It made no income tax or social security tax withholdings in their behalf. Nor did it carry workmen's compensation with respect to the distributors.

Moreover, before the establishment of distributorships the Company gave drivers vacation pay and provided relief drivers in the event of the regular driver's absence. Afterwards, the distributor was responsible for his relief, and hired whatever help he needed, paying such helpers or substitutes out of his own income (J.A. 21, 23, 31-32, 151).

ARGUMENT

The record presents no issue encompassed by the rules for granting a writ of certiorari. Petitioner's basic quarrel with the affirmance of the Board order by the court below is that such order was narrower than the relief to which it was entitled. In order to reach that question, however, Petitioner would have to demonstrate to this Court that both the Court of Appeals and the Board erred in finding that certain challenged individual contracts established a genuine independent contractor status. Even though this Court should agree with Petitioner on this substantive question, it would not follow that Petitioner was improperly denied the relief for which it is contending. This Court has repeatedly stressed that the formulation of a remedial order under Section 10(c) of the Act "is particularly a matter for administrative competence" and that "courts must not enter the allowable area of the Board's discretion". As Petitioner

does not argue that the Board exceeded its statutory powers in this case, further judicial review of the substantive issue would be unavailing so far as Petitioner is concerned with respect to accomplishing a revision of the Board order.

Accordingly, there is no basis for Petitioner's assumption that if it be held that the Board (and the court below) should have found violations of Sections 8(d) and 8(a)(3) of the Act—the Board would thereupon be *compelled* to order that the individual distributorship contracts freely executed by the former employees be abrogated, and that the six drivers who did not wish to enter into the distributor contracts be reinstated as employees with back pay.

1. The Union's Formulation of the "Questions Presented" Describes an Issue Not Presented by the Record

In its petition for certiorari, the Union has stated that the case presents two questions for the consideration of this Court. The first question deals with the adequacy of the remedy and the second with whether a proper conclusion of law was drawn from the findings of fact. The first question as drawn in the petition (Pet., p. 2), however, assumes a hypothetical situation, it complains of the inadequacy of a Board order in a case "... where the employer had not given the notices of termination or modification of the collective agreement and had not continued it in full force and effect for its term as required by Section 8(d) of the Act ...".

This case could be described in the foregoing manner only if this Court should hold that the second question presented in the petition should be answered in the affirmative. This would necessitate a holding that the Court of Appeals erred in its conclusion that "the

drivers ceased to be employees and became independent contractors when they signed contracts for distributorships". The Union itself regards this latter issue as one of law (Pet., p. 19).

Unless the drivers remained employees after the execution of the individual contracts, the employer was not attempting to terminate or modify any collective agreement relating to wages, hours and conditions of *employment*. No party has contended that with respect to the employees covered by the collective agreement who did not enter into the individual distributor arrangement, the agreement regarding them was not "continued in full force and effect for its term". This includes the six drivers who refused to sign. Their employment continued until after the expiration of the collective agreement, when it was terminated as a result of what the court below described as a "reduction in force" (Pet., p. 23). Thus the first question raised by the Union in its petition would never be reached unless this Court decides to reverse the court below on the issue of employee status which Petitioner obviously regards as one of secondary importance.

Somewhat inconsistently in the body of its petition, however, the Union contends that even though the employment status question was properly resolved against it (Pet., p. 14), the Board still should have enlarged its remedial order so as to have granted Petitioner the relief it sought, viz., abrogation of the independent contractor contracts and reinstatement of the six drivers who had declined to sign them.

Obviously this is a broader issue[1] than the one

[1] The Board in restating the "question" for its Brief in Opposition assumed that this was the issue upon which the Union wanted this Court to pass. It overlooked the hypothetical background in which the Union posed the issue of remedy.

described by Petitioner itself in the "questions presented" and is certainly one not presented to this Court in view of the limitations imposed by Petitioner in formulating it.

2. The Court of Appeals Was Plainly Correct in Holding That the Drivers Who Signed Individual Contracts Were No Longer Employees

In urging this Court to resolve the status as "employees" under Section 2(3) of the Act of persons entering into individual distributorship contracts with the Company, Petitioner professes to discover an issue of "national importance". It is difficult to understand how the resolution of the question in the instant case could have any bearing on the future administration of the Act. So far as the Act is concerned, the test for distinguishing between "employees" and "independent contractors" is clear. In the case of *N.L.R.B.* v. *Hearst Publications*, 322 U.S. 111, this Court held that the term "employee" might well have a broader meaning in the context of Federal social legislation than the ordinary common law standard.

On this sole ground, it reversed a holding of the Court of Appeals for the Ninth Circuit which had set aside a Board order predicated upon an administrative finding that certain news vendors were "employees" of the newspapers they distributed. According to the reviewing court, the finding could not be supported on ordinary principles of the law of agency—a view not overruled by the Supreme Court.

The legislative history of the Taft-Hartley Act makes it clear that the addition of the words "independent contractor" in the text of Section 2(3) was intended to overrule the *Hearst* decision and to make

the common law test, rather than the broad policy of the Labor Relations Act, controlling with respect to determining whether a given person was an employee.[2]

It is submitted that the opinion of the dissenting judge in the court below to the contrary flies in the face of manifest Congressional intent. The text of the opinion also fails to mention that the enlargement of the scope of judicial review in Sections 10(e) and 10(f) was explained by the Senate Committee in its report as necessitated by "the great tendency on the part of the courts not to disturb Board findings even though they may be based on questions of mixed law and fact. *N.L.R.B.* v. *Hearst Publications*, 322 U.S. 111 . . .".[3]

If this principle of law were in dispute, an issue of importance would presumably be raised. But the court below did not depart in the least from common law precepts, merely applying the recognized law to the facts (as stated in the Board's brief in opposition) in approving Chairman Leedom's finding concerning the independence of the owner-drivers from Company

[2] "The House bill excluded from the definition of employee individuals having the status of independent contractors. Although independent contractors can in no sense be considered to be employees, the Supreme Court in *N.L.R.B.* v. *Hearst Publications, Inc.*, 322 U.S. 111, held that the ordinary tests of the law of agency could be ignored by the Board in determining whether or not particular occupational groups were 'employees' within the meaning of the labor act. Consequently it refused to consider the question of whether certain categories of persons whom the Board had deemed to be employees were not in fact and law independent contractors". *Report of Hse. Conf. Mgrs.*, No. 510 on *H.R. 3020*, 80th Cong., 1st Sess., pp. 32, 33; *Legis. Hist.*, pp. 536-37.

[3] *S. Rept. No. 105 on S. 1126*, 80th Cong., 1st Sess., *I Legis. Hist.*, p. 432.

control. This finding did not seize upon a single element as controlling its decision. Instead, it weighed all the factors governing the relation between the Company and the drivers. Hence consideration by this Court of such issue in the instant case would result only in a decision limited to the particular provisions of the challenged contract and would provide little guidance for the Board or the courts in future litigation involving slightly different factual situations.

In any event, the conclusion of the court below on this point was not erroneous, despite the absence of any statement explaining its basis. The summary of the purported facts upon which two Board members rested their disagreement with Chairman Leedom and on which the dissenting judge relied, is not only inaccurate in some particulars[4] but ignores the actual administrative practice under the individual contract. Thus the minority opinion failed to mention that many of the drivers purchase their own advertising media and have their names painted on the trucks, that several of the owner-operators also carry and sell products not processed by the Company, such as ice cream, oleomargarine, eggs, bacon, ham and turkeys, that they are free to charge whatever prices they see fit to customers on their routes, and that their earnings depend upon the difference between the price they pay the Company for their milk and the price

[4] E.g., It is a distortion to characterize a right to re-purchase on 30 days notice as a "right to terminate unilaterally the services of a driver for any cause". Nor is the duty of the driver to hire his own relief and vacation help, as found by the trial examiner, the same as "the right unilaterally to name and appoint substitutes for the driver". The record is also barren of any evidence to support the assertion that the Company reserved "the right to police the manner in which those services are rendered."

they charge, less such expenses as the owner-operator incurs for advertising, helpers' wages, truck maintenance, licensing, insurance and other costs of operating the business.

Neither of these Board members, nor the dissenting judge, showed any awareness of a decision of this Court affirming a decision that in situations similar to the instant one, the actual administrative practice of a supply company with respect to owner-drivers rather than the theoretical control retained by the Company should be deemed controlling. *Gray Line* v. *Harrison*, 156 F. 2d 412 (CA 7), aff'd *sub nom. United States* v. *Silk*, 331 U.S. 704.

That holding of this Court is of particular significance here as the question of the employee status of the owner-truck drivers involved in the *Gray* case arose under the Social Security Act and the Court in deciding that the owner-operators were not employees, also considered the possibility that the word "employee" might have a broader meaning in the context of Federal social legislation than the ordinary common law standard. As Congress disapproved the *Hearst* holding when it amended Section 2(3) of the Act so as to exclude from the definition of "employee" individuals having the status of independent contractors, the result reached by the Court in *Gray* would seem to control here *a fortiorari* where the term "employee" because of the Taft-Hartley amendment has a narrower meaning. Obviously the drivers of the *Gray* case had considerably less latitude for the exercise of independent discretion than the owner-drivers whose status is at issue here.

3. The Contention That the Board Would Have Been Compelled to Issue a More Stringent Order If It Found the Drivers Retained Their Status as Employees Is Plainly Without Merit

The heart of the Union's disagreement with the Board and the Court below lies in its contention that the remedy, rather than requiring the Company to bargain with the Union in the future with respect to the installation of individual distributorships, should abrogate the existing contracts and reinstate to employment the six former employees who refused to accept the employer's proposal. According to Petitioner (Pet., p. 14) had "a majority of the Board been able to conclude that the drivers had retained their employee status notwithstanding the signing of the individual agreements, the Board would have been obliged to grant the additional relief requested." Petitioner cites no authority for this proposition other than to assert that "it is not controverted by counsel for the Board and it is implicit in the Board's decision . . .". The record, however, reveals no such concession, implied or express.

Acceptance of the Union's proposition would jeopardize the long established discretion of the Board to formulate remedies on the basis of its experienced judgment.

On several occasions this Court has not only acknowledged but emphasized the importance of such discretion to the administration of the Act. Thus in *Phelps Dodge Corporation* v. *N.L.R.B.*, 313 U.S. 177, this Court expressed the broad reaches of Board authority in the area of remedy and the consequent limited scope of judicial review in the following terms, 313 U.S. at 194:

> "A Statute expressive of such large public policy as that on which the National Labor Relations Board is based must be broadly phrased and necessarily carries with it the task of administrative application. There is an area plainly covered by the language of the Act and an area no less plainly without it. But in the nature of things Congress could not catalogue all the devices and stratagems for circumventing the policies of the Act. Nor could it define the whole gamut of remedies to effectuate these policies in an infinite variety of specific situations. Congress met these difficulties by leaving the adaption of means to end to the empiric process of administrations. The exercise of the process was committed to the Board, subject to limited judicial review. Because the relation of remedy to policy is peculiarly a matter for administrative competence, courts must not enter the allowable area of the Board's discretion and must guard against the danger of sliding unconsciously from the narrow confines of law into the more spacious domain of policy. On the other hand, the power with which Congress invested the Board implies responsibility—the responsibility of exercising its judgment in employing the statutory powers."

This decision was noted with approval in *N.L.R.B.* v. *Gullet Gin Co.*, 340 U.S. 361. See *N.L.R.B.* v. *Seven-Up Bottling Co.*, 344 U.S. 344 (accord).

That the administrative discretion reposed in the Board was not abused is clearly indicated by an analysis of the record and the Board's findings with respect to that record. The Board found, and indeed there was no evidence to the contrary, that the Company's changeover from employee drivers to independent drivers was not motivated by the desire to avoid bargaining with the Union but was undertaken solely

for economic reasons, the Board stating, 119 NLRB at 1007:

> "The record in the instant case does not establish that, in discharging the six drivers or in instituting the independent distributorship system, the Respondent was motivated by any desire not to bargain with, or to discourage membership in the Union. Here, as in *Brown Truck*, as far as appears, the Respondent engaged in such conduct because of economic considerations."

Again, in its Decision and Order on remand, 124 NLRB No. 63 at 4, the majority states:

> "The Chairman further finds that the Respondent adopted the new distributorship system for economic reasons and that, in discharging the six drivers who refused to sign independent distributorship contracts, the Respondent was motivated by economic considerations and thus did not violate Section 8(a)(3) of the Act."

In view of this finding, it is clear that the evidence cannot sustain a finding of an 8(a)(3) violation based upon a purported desire to thwart union organization or representation through the discharge of the six recalcitrant employees. Nor does the Union seriously contend that the latter reason governed their discharge (Pet., p. 17). The most that can be said for the Union's position was the stated rationale of the dissenters to the Board decision who would order the reinstatement of the dischargees as a derivative of the 8(a)(5) violation on the theory that "the six drivers lost their jobs as a direct consequence of the Respondent's failure to confer with the Union . . ." If the theory of the dissenters is true, that reinstatement and back pay can be predicated upon a finding of 8(a)(5), the violation found herein, subsidiary findings of an

8(d) or for that matter an 8(a)(3) violation would be superfluous to the fashioning of a remedy, since neither finding would be inconsistent with the Company's unquestioned good faith in the matter.

The Union has asked that "the redress to be affected should include not only abrogation of the individual contracts, but also reinstatement of the six discharged drivers". (Pet., p. 17). The real question posed is this: in denying such relief, did the Board abuse its discretion in ordering cessation of future refusals to bargain without nullifying past acts in a situation where the Company in good faith has substantially transformed its method of operation with the apparent approval of its former employees, though without requisite discussion with the Union. The answer clearly is in the negative.

Of significance to the framing of the Board's order is the fact that at the initial hearing 46 of the independent truckdrivers "sought to intervene to protect their interests under the individual contracts", 119 NLRB at 998, n. 2. Their desire to intervene demonstrates that the drivers regarded their independent status as an economic improvement rather than a deprivation of rights. For the Board to nullify economic benefits admittedly satisfactory to the bulk of the drivers merely because the Company had unwittingly committed a technical violation of the Act would surely do violence to the avowed statutory policy "to prescribe the legitimate rights of both employees and employers in their relations affecting commerce . . ." Labor-Management Relations Act, Section 1(b).

Thus the Board's order is not unreasonable, and in fact constitutes a delicate balancing of interests among the rights of employees, union, and employer.

It therefore falls well within the allowable discretion referred to in *Phelps Dodge* and subsequent cases, and, in accordance with the decisions of this Court, is not subject to judicial revision.

The notion that the doctrine of *N.L.R.B.* v. *District 50*, 355 U.S. 453, has some application to the instant case must be rejected. There, the Court, far from modifying a Board order because it was too narrow, held that the Board had acted in excess of its authority by framing an order which was intended to do more than remedy a particular unfair labor practice situation. The case contained no suggestion, however, that regardless of extenuating circumstances, a finding of a specific unfair labor practice made it incumbent upon the Board to prescribe the most extreme remedy within its powers.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER TERM, 1960

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, LOCAL UNION NO. 310, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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OPINIONS BELOW

The opinion of the Court of Appeals (Pet. 22-35) is not yet reported. The Board's Decision and Order (J.A. 111-143)[1] is reported at 119 NLRB 998, and its Decision and Order on Remand (*infra*, pp. 13-36) is reported at 124 NLRB 494.

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[1] "J.A." refers to the joint appendix to the briefs of the parties filed in the court below.

JURISDICTION

The judgment of the court below (Pet. 23) was entered on June 16, 1960. The petition for a writ of certiorari was filed on September 9, 1960. The jurisdiction of the Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the National Labor Relations Board, upon finding that the employer violated the bargaining requirements of the National Labor Relations Act by failing to discuss with the Union a change in its method of operation, acted within its authority under Section 10(c) of the Act, to provide such remedy "as will effectuate the policies of [the] Act," in requiring the employer merely to bargain with the Union concerning the continuance of the new arrangement and to cease and desist from taking such unilateral action in the future, but not to undo the action already taken.

STATUTE INVOLVED

The relevant statutory provisions are set forth at pages 3-5 of the Petition.

STATEMENT

A. The Board's findings of fact

The Company sells its dairy products in the Tucson, Arizona, area. In July 1955, it employed approximately 70 drivers who sold its products under a con-

ventional salary plus commission arrangement. The drivers, along with the plant men, were represented by petitioner union, under a contract which was due to expire October 1, 1955. At a series of meetings, beginning on July 12, 1955, Company officials advised the drivers that, for the past year, the Company had under consideration a distributorship plan, under which the drivers would operate as independent contractors (J.A. 112, 148; 62). After the details of the plan had been explained, all but six of the drivers, voluntarily signed individual distributorship contracts (J.A. 113, 148). The six drivers who did not wish to become independent distributors continued working under the terms of the Company's contract with the Union, until its expiration on October 1, 1955. Two days later, the Company notified the six drivers that their services were no longer required because they had shown no interest in purchasing a milk route. (J.A. 113-114, 150.)

Meanwhile, by letter dated July 29, 1955, the Union notified the Company that its signing of individual contracts with the drivers constituted a breach of the current collective bargaining agreement (J.A. 113, 148-149). On October 3, the Company met with the Union and submitted a proposal which excluded the drivers, on the ground that they were now independent contractors. (J.A. 113, 149.) The Union requested a postponement (J.A. 113, 149), and the parties have not bargained further on this matter.

Under the independent distributorship plan instituted by the Company, the drivers bought their trucks

and routes from the Company, and derived their income from profits realized in the sale of products purchased from the Company. Although the Company reserved the right to operate a route in an emergency and also reserved the right to recapture a route on 30 days' notice, the plan vested the drivers with a large measure of discretion and control. Except for general instructions regarding routes and hours of delivery, handling and development of the routes were left to the judgment and discretion of the drivers. The plan shifted responsibility for truck maintenance, licensing, and insurance from the Company to the drivers, who were also made directly responsible for compliance with all laws, rules and regulations relating to health and sanitation. Similarly, the drivers paid their own Social Security and other taxes. Moreover, although all sales were previously made at uniform prices set by the Company, the drivers could now set their own prices. And, they were permitted to purchase their own advertising media, and to have their names painted on the trucks. (J.A. 118-120, 151-152, 70-82.)

B. The Board's initial decision and order

Based upon these facts, the Board, on December 16, 1957, concluded that the Company violated Section 8(a)(5) of the Act by adopting the independent distributorship plan without affording the Union an opportunity to bargain with respect thereto, but that the Company had not violated Section 8(a)(3) by terminating the employment of the six drivers who

refused the plan (J.A. 120-124). This conclusion, however, was arrived at by varying routes.

Chairman Leedom found that the drivers who signed independent distributorship contracts converted their status from that of an employee to that of an independent contractor excluded from the Act. However, before adopting the plan, the Company was obliged to bargain with the Union, and its failure to do so constituted a violation of Section 8(a)(5) (J.A. 122). In view of his holding, he found it unnecessary to determine whether the Company's conduct also constituted an unlawful refusal to bargain because of non-compliance with the notice requirements of Section 8(d) of the Act (J.A. 122, n. 13). Chairman Leedom further found that, as the Company adopted the plan for economic reasons and not to avoid bargaining with, or to discourage membership in, the Union, the Company had not violated Section 8(a)(3) of the Act by discharging the drivers who did not wish to purchase their routes (J.A. 124-125).

Member Murdock concurred in Chairman Leedom's finding that the Company had unlawfully bypassed the Union in adopting the independent distributorship plan. However, he dissented from his finding that the plan established an independent contractor relationship and would have found that the Company further violated Section 8(a)(5) of the Act by executing individual contracts of employment with the drivers and by failing to comply with the requirements of Section 8(d) before so modifying its collective bargaining agreement with the Union (J.A.

129-133). Member Murdock would also have found that the six drivers who refused to enter the plan were discharged as a consequence of their exercising a right to refrain from individual bargaining with the Company, and therefore that their discharges were violative of Section 8(a)(3) of the Act (J.A. 134-135).

Member Bean found no refusal to bargain on the ground that the record did not establish that the Union represented a majority of the Company's drivers at the time of the alleged refusal to bargain (J.A. 138-141). Moreover, he agreed with Chairman Leedom that the Company did not violate Section 8(a)(3) by discharging the non-signing drivers.

To remedy the violation found by Chairman Leedom and concurred in by Member Murdock, the Board entered an order (J.A. 126-128) which required the Company to cease and desist from refusing to bargain with the Union with respect to the adoption or continuance of the independent distributorship plan insofar as it affects the tenure of its employees, and from entering into any new independent distributorship contract with any person unless and until it bargains with the Union concerning the plan. Affirmatively, the order required the Company to bargain collectively with respect to the plan insofar as it affects employee tenure, and to post an appropriate notice.

C. The Board's supplemental decision

The Union sought review of the Board's Decision and Order in the court below, which, after hearing,

remanded the case to the Board for further consideration (Pet. 8-9). After such reconsideration, the Board entered a Decision and Order on Remand (*infra*, pp. 13-36). Chairman Leedom and Member Bean adhered to their previous positions, except that Chairman Leedom additionally found that the Company did not violate Section 8(d) by instituting the independent distributorship system without complying with the notice requirements of that Section (*infra*, pp. 17-19, 30-34). Members Jenkins and Fanning[2] reached substantially the same conclusions previously reached by Member Murdock (*infra*, pp. 19-26).

The Board, having upon reconsideration found the same violation as previously, entered an order identical with the previous order (*infra*, pp. 28-30).

D. The decision of the Court of Appeals

The court below, Judge Washington dissenting, enforced the Board's order. The court found that the drivers became independent contractors upon signing distributorship contracts, that the discharge of the non-signing drivers resulted from a "reduction in force," and that the Company's failure to discuss the independent distributorship plan with the Union "technically violated the Act." In these circumstances, the court concluded that the Board's order was an appropriate remedy (Pet. 23).

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[2] Member Fanning, in the meantime, had replaced Member Murdock. Member Rodgers did not participate in the decision.

ARGUMENT

The decision of the court below is correct; it is limited to the peculiar facts of this case; and it does not conflict with that of any other court of appeals. No issue warranting review by this Court is presented.

1. The sole question presented is whether the Board abused its discretion under Section 10(c) of the Act, to provide such remedy "as will effectuate the policies of this Act," in merely requiring the Company to bargain with the Union concerning the continuation of the independent distributorships and to refrain from establishing new ones unilaterally, instead of also requiring that the Company cancel the individual contracts outstanding and reemploy the six drivers who were terminated for failure to enter into such contracts. On the facts of this case, the Board's order was not unreasonable.

The Company violated the Act only in that it failed to give the Union an opportunity to discuss the independent distributorship plan as it affected the tenure of the drivers. The Company's omission stemmed from its good faith belief that, since independent contractors are outside the Act, the drivers could determine for themselves whether they wished to abandon their employee status and become independent contractors. It further appears that the drivers signed the independent distributorship contracts voluntarily, entering into, as the court below could properly find (see p. 11, *infra*), a genuine independent contractor relationship. To require the Company to bargain

with the Union respecting the continuation or extension of the plan, without abrogating the contracts already entered into, provides an effective remedy for the limited unfair labor practice which was committed, while at the same time preserving, unless and until the parties should determine otherwise, a relationship created in good faith.

Thus, since the individual contracts are terminable upon 30 days' notice by any contracting party, the Company, if persuaded by the Union in the future bargaining negotiations, may readily return to the employee method of distributing its products. Moreover, the Union's bargaining position, insofar as it rests upon driver support, is not compromised by continuing the contracts in effect. For, if the drivers are dissatisfied with the new system, they will presumably back the Union's efforts to return to the old method. On the other hand, the Union cannot complain if the drivers are still willing to forego collective bargaining rights under the Act for the benefits under the independent contractor plan.

Nor did the Board abuse its discretion in declining to order reinstatement of the six drivers who were terminated for failure to enter into the individual contracts. The Company discharged these drivers because they would not work as independent contractors and not in reprisal for having insisted on bargaining through the Union. As the discharges were unrelated to union activity, vindication of the statutory policy against discrimination did not require ordering these employees reinstated with back pay. Nor is such relief required under Section 8(a)(5) to remedy

the Company's failure to bargain with the Union over the adoption of the independent distributorship plan, for this violation is adequately remedied by preventing a recurrence of the unfair labor practice, and ensuring collective bargaining in the future.

In sum, the remedy provided by the Board was adequate for the limited violation found.

2. The fact that the court below did not pass on the question of whether the Company's action violated Section 8(d) of the Act, does not, as petitioner suggests (Pet. 12, 14-17), impair this conclusion. Section 8(d) provides that a party to a collective agreement shall not terminate or modify that agreement without giving a 60-day notice to the other party, and that, while the notice period is running, he shall continue the agreement in full force and effect, without resorting to strike or lockout. Under the facts, as the court below viewed them, it was unnecessary for it to consider whether the Company's action violated Section 8(d), for, even had it so concluded, this would not have compelled any additional relief. The violation of Section 8(d) would be essentially the same as the violation of Section 8(a)(5) already found by the Board, i.e., a premature modification of the existing agreement without notification to the other party. Just because Section 8(d) specifies that the contract shall be kept in full force during the notice period, it does not follow that, if there is a failure to comply with this requirement, the only appropriate relief is the restoration of the *status quo*. Under the particular circumstances of this case, the court

below could well have concluded that the relief provided by the Board for the Section 8(a)(5) violation would also have been a sufficient remedy for the Section 8(d) violation.

Nor, contrary to petitioner's contention (Pet. 13, 18-20), is an issue warranting review presented by the finding of the court below that the drivers became independent contractors by entering into the individual distributorship contracts. On the facts set forth pp. 3-4, *supra*, ample basis existed for this conclusion. See *United States* v. *Silk*, 331 U.S. 704. In any event, the difference between the members of the Board and the members of the court on whether an independent contractor status was created is not over the principle to be applied, but only with respect to the inferences to be drawn from the facts. There is no occasion for this Court to review the Court of Appeals' resolution of this factual issue.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

J. LEE RANKIN,
Solicitor General.

STUART ROTHMAN,
General Counsel.

DOMINICK L. MANOLI,
Associate General Counsel.

NORTON J. COME,
Assistant General Counsel.

MELVIN POLLACK,
Attorney,
National Labor Relations Board.

OCTOBER 1960.

APPENDIX

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

Case No. 21-CA-2292

SHAMROCK DAIRY, INC., SHAMROCK DAIRY OF PHOENIX, INC., AND SHAMROCK MILK TRANSPORT CO.

and

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, LOCAL UNION NO. 310

DECISION AND ORDER ON REMAND

On December 18, 1957, the National Labor Relations Board, acting through a panel composed of Boyd Leedom, Chairman, and Abe Murdock and Stephen S. Bean, Members, issued its Decision and Order in the above-entitled proceeding.[1] A majority of the panel, consisting of Chairman Leedom and Member Murdock, found that the Respondent had refused and was refusing to bargain collectively with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union No. 310, the charging Union, and ordered the Respondent to cease and desist therefrom and take certain affirmative action. Member Bean dissented from that portion of the Decision and Order. Another majority of the panel, consisting of Chairman Leedom and Member Bean, found that the Respondent had not violated Section 8 (a) (3) of the Act by discharging

[1] 119 NLRB 998.

six drivers and dismissed the remaining allegation of the complaint alleging such a violation. Member Murdock dissented from that portion of the Decision and Order.

Thereafter, on November 5, 1958, after hearing oral argument on the Union's petition to review and modify the Board's Order in this case, the United States Court of Appeals for the District of Columbia "concluded that it cannot properly review the Order of the . . . Board without specific findings" on certain questions which are hereinafter set forth, and directed the Board to make such findings and transmit them to the Court.

Thereafter, on February 26, 1959, upon the Board's application,[2] the Court rescinded the remand previously ordered and remanded the case to the Board "with directions to reconsider the entire cases (sic), including, but not limited to, the questions specified in the Order of November 5, 1958."

The questions specified in the Court's remand are as follows:

> (1) Whether, upon the facts of this case, the drivers retained their employee status notwithstanding the negotiation of the individual contracts between the employer and the drivers, or whether their status changed to that of independent contractor.
>
> (2) Whether, if the Board should find that the drivers became independent contractors, the employer, Shamrock Dairy, Inc., violated Section 8 (d) of the National Labor Relations Act when

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[2] In the interim, the composition of the Board's membership had changed. Member Murdock's term of office expired on December 16, 1957; he was succeeded by Member John H. Fanning.

it negotiated the individual contracts with the drivers.

(3) . . . should the Board find that Section 8 (d) was violated, . . . whether Section 8 (a) (3) was violated by the employer's discharge of the six employees.

Pursuant to the Court's remand order, the entire Board, with the exception of Member Rodgers who disqualified himself, has considered the case *de novo*. The Chairman, Member Bean, and Members Jenkins and Fanning, respectively, have divergent views as to the disposition of this case. In accordance with such views, there is herewith transmitted to the Court the following findings and determinations:

With respect to jurisdiction, the Board hereby makes the same findings and determinations made in the Board's Decision and Order of December 16, 1957.

The Board hereby denies the Respondent's request for oral argument; as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. Accordingly, the rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions and briefs, and the entire record in this case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner set forth in his Intermediate Report, a copy of which is attached hereto, only to the extent consistent herewith.[3]

[3] Among other things, the Trial Examiner found that, by "making credits in the retirement fund immediately avail-

The Board hereby makes the same findings of fact which were set forth as the essential facts in this case in the Board's Decision and Order of December 16, 1957.

A majority of the Board, consisting of the Chairman and Members Jenkins and Fanning, find that the Union had majority status and was at all times material the exclusive representative of the employees involved here. The Respondent granted exclusive recognition to the Union as the representative of the Respondent's employees in the 2-year contract, executed on October 1, 1953. Such recognition raises a presumption of regularity, namely, that the Union was the majority representative of the employees at the time of the execution of the contract; for, otherwise, it would have been unlawful for the Respondent to have extended such recognition. There is no evidence to rebut this presumption. Nor is there any evidence that the Union lost such majority status at any time after execution of the contract. By virtue of the existence of the contract, the Union was entitled to exclusive recognition for at least the term of the contract. *Hextron Furniture*, 111 NLRB 342. *N. L. R. B.* v. *Dorsey Trailers, Inc.*, 179 F. 2d. 589 (C.A. 5), relied on by the Respondent, is inapposite. There, unlike here, the contract had terminated before the time of the alleged refusal to bargain. On the basis of the foregoing, the Respondent was obligated to treat with the Union as the majority representative of the employees at the time of the alleged unfair labor practices which occurred in the period

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able to those who purchased routes", the Respondent independently violated Section 8 (a) (1). There is no such allegation in the complaint and the record evidence does not support such an allegation.

from sometime in July to October 3, 1955, inclusive.

Member Bean finds that the Union did not represent a majority of the employees at the time of the alleged unfair labor practices, as more fully set forth in his separate opinion filed herewith. Member Bean states therein that "the contract can be of no value as an indication of the Union's status among the Respondent's employees considered as a separate unit" because, in substance, the contract covered other employers as well as the Respondent. However, as pointed out in the decision of December 16, 1957, the complaint alleged that the Respondent's employees alone constituted an appropriate unit and the Respondent's answer admitted that the Respondent contracted with respect to such unit in the contract of October 1953. Moreover, the Respondent's answer further admitted that such contract unit was "an appropriate unit"; the Trial Examiner found that the Respondent's employees alone constituted an appropriate unit; and the Respondent at no time took the position that a more comprehensive unit was appropriate.

Adhering to his previously expressed position in the Decision of December 16, 1957, and for the reasons stated therein, the Chairman finds that the Respondent, which had theretofore distributed its products through driver-salesmen, entered into individual contracts with the bulk of its driver-salesmen which converted their status from that of employees to that of independent contractors, without any notice and without bargaining with the Union, the recognized exclusive representative under an existing contract. The Chairman further finds that the Respondent adopted the new distributorship system for economic reasons and that, in discharging the six drivers who refused to sign independent distributorship contracts,

the Respondent was motivated by economic reasons and thus did not violate Section 8 (a) (3) of the Act. In addition, the Chairman finds, even though the drivers became independent contractors under the individual contracts, that the Respondent violated Section 8 (a) (5) and (1) of the Act in that it failed to bargain with the Union as to whether the independent contractor system of distribution should be adopted.

In the Decision of December 16, 1957, the Chairman stated that, as he had found a violation of Section 8 (a) (5) on another ground, he had no occasion to pass on whether the Respondent also violated Section 8 (a) (5) by reason of a violation of Section 8 (d). Accordingly, in the Decision of December 16, 1957, the Chairman did not pass on whether the Respondent violated Section 8 (d). Pursuant to the Court's remand, the Chairman now makes a determination of that issue and, in doing so, finds that the Respondent did not violate Section 8 (d) for the following reasons.

Insofar as pertinent, Section 8 (d) provides that: ". . . where there is in effect a collective bargaining contract covering employees . . ., the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification" . . . serves written notices 60 days prior to the expiration date of the contract . . . and continues in full force and effect, without resorting to strike or lockout, "the existing contract for a period of 60 days after such notice is given or until the expiration date of such contract, whichever occurs later. . . ". At the time of the establishment of the independent distributorship plan here in July 1955, there was in existence a collective bargaining contract which was

to expire on October 1, 1955. No statutory notices were served by the Respondent. However, although the Respondent executed individual contracts with the bulk of the drivers, these contracts were not contracts of employment and the Respondent continued in full force and effect the provisions of the collective bargaining contract until October 1, 1955, with respect to those drivers who did not sign individual contracts and as to plant employees (nondrivers) who were covered by the collective bargaining contract but not directly affected by the institution of the independent distributorship system for drivers. The execution of the individual contracts was not inconsistent with the collective bargaining contract as the individual contracts pertained not to terms or conditions of employment but involved the termination of the employment status of the drivers who signed the individual contracts and substitution therefor of the status of independent contractor. Thus, no provision in the individual contracts conflicted with or changed the collective bargaining contract in any respect. See *Sloan* v. *Journal Publishing Co.*, 42 LRRM 2490; *Adams Dairy Co. v. Dairy Employees Union*, 363 Mo. 182, 250 S. W. 2d 481, 30 LRRM 2128. As the Respondent did not modify or terminate the collective bargaining contract, the Chairman finds that there was no violation of Section 8 (d).

Members Jenkins and Fanning agree with the Chairman for the reasons stated hereinafter that the Respondent violated Section 8 (a) (5) and (1) by failing to bargain with the Union as to whether the so-called independent contractor system of distribution should be adopted.

The Respondent adopted the so-called independent distributorship plan without notice to the Union and entered into individual contracts with the drivers

without giving the Union, the exclusive bargaining representative, a chance to negotiate with regard to the tenure of the employees to be affected by the alleged independent distributorship plan. Thereafter, the Respondent ignored the Union's letter requesting rectification of the change and notified the Union that the Respondent would not bargain with respect to those drivers who had signed individual contracts. By this course of conduct, the Respondent failed to perform its duty to bargain collectively. This duty includes the obligation to notify the collective bargaining representative and to give such representative a chance to negotiate with respect to a contemplated change concerning the tenure of the employees and their conditions of employment. *Brown Truck*, 106 NLRB 999. In *Brown Truck*, where the employer moved its Charlotte plant to Monroe, N. C., for economic reasons, discharged its Charlotte employees, and did not employ them at Monroe, the Board found that the employer violated Section 8 (a) (5). Here, as in *Brown Truck*, the employer did not give the Union an opportunity to bargain with respect to the contemplated change as it affected the tenure of the employees. The Union was entitled to such opportunity, and the Respondent failed and refused to accord it. By such conduct, the Respondent violated Section 8 (a) (5) and (1) of the Act.[4]

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[4] The Respondent contends that the Union waived its bargaining rights with respect to the institution of the so-called independent distributorship plan by not requesting bargaining concerning it, by advising the drivers to consult a lawyer as to whether they should sign the individual contracts offered, and by taking no action other than outlined in the statement of facts referred to above. However, as the Trial Examiner found, the Union made an adequate request to bargain in its letter of July 29, 1955. On August

In addition thereto, Members Jenkins and Fanning also find, as did the Trial Examiner, that the Respondent violated Section 8 (a) (5) and (1) of the Act on the following two grounds: (1) The drivers retained their employee status under the individual contracts, and thus the Respondent engaged in unlawful individual bargaining by execution of the individual contracts; and (2) as the drivers retained their employee status under the individual contracts, the Respondent modified or terminated the collective bargaining contract by the execution of the individual contracts without complying with the notice requirements of Section 8 (d).

With respect to the first of the foregoing two additional grounds, Members Jenkins and Fanning are of the view that the drivers retained their employee status under the individual contracts for the following reasons. An employer-employee relationship exists where the person for whom the services in question are performed reserves the right to control not only the result to be achieved but also the means to be used in reaching such result.[5]

An examination of the provisions of the individual distributorship contract reveals that the Respondent's

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2, 1955, the Union promptly filed refusal to bargain charges based upon institution of that plan. At the bargaining meeting of October 3, 1955, the Respondent expressly stated that it would not recognize the Union with respect to those drivers who had signed individual contracts. And, as the Trial Examiner found, any attempt by the Union thereafter to bargain with respect to those drivers would have been futile. For these reasons, the Board finds no merit in the waiver contention.

[5] See, for example, *Oklahoma Trailer Co., Inc.*, 99 NLRB 1019, 1022; *Nu-Car Inc.*, 88 NLRB 75, 83, enf'd 189 F. 2d (C.A. 3).

drivers who signed such a contract did not lose their existing employee status by execution of the individual contracts. In the individual contract, the Respondent granted to the drivers the exclusive right to distribute its products upon express terms set forth therein. These terms included (1) in the event that the Respondent determined that the territory assigned to a driver was too large for the driver adequately to service, the Respondent at any time could alter the boundaries of the territory to assure to the Respondent's satisfaction that customers were properly serviced; (2) that a driver must not sell any product in his territory not manufactured by the Respondent; (3) that the Respondent would set the prices at which its products are sold to a driver, and the Respondent reserved the absolute right to change those prices; (4) that the Respondent could prescribe the time and places at which delivery of its products to the drivers must be received as well as prescribe the times and places for delivery of its products to customers; (5) that the Respondent retained the "continuing, unconditional and irrevocable option to purchase at any time the entire distribution business" of a driver, including the truck, route, clientele, and good will, at a preestablished price, and that the driver had no right to sell or assign any rights under the contract without the Respondent's consent; (6) in the event the Respondent exercised the option to purchase the business, the driver could not re-enter the business of distributing dairy products for a period of two years; (7) that , if the Respondent determined that customers would not receive promptly delivery of its products because of "any accident, strike, emergency or any other cause," the Respondent would take over a driver's route and equipment, without notice to him, and operate and

continue same during these periods; (8) that a driver must diligently and faithfully promote sales of the Respondent's products, complying with all laws, rules, and regulations relating to health and sanitation, and maintain a neat and tidy appearance; (9) that drivers were required to insure their trucks for property damage in certain stated substantial amounts, all insurance policies to be approved by the Respondent; (10) that in the event a driver's truck broke down, the Respondent would furnish a spare truck at no expense to the driver except for gasoline and oil; however, if the driver chose to use a vehicle other than that provided by the Respondent, the Respondent must first approve the use of such vehicle; and (11) in the event that a driver became incapacitated and was unable to perform his duties, the driver must select a substitute named and approved by the Respondent and the driver was required to compensate the substitute at a wage and commission fixed by the Respondent.

Thus, the individual contracts reserved to the Respondent the right to terminate unilaterally the services of the driver for any cause, the right unilaterally to name and appoint substittues for the driver and to fix the compensation of such substitutes, the right unilaterally to determine the times and places at which the driver's services are to performed, and the right to police the manner in which those services are rendered. Moreover, under the terms of the individual contract the driver was required to deal exclusively in the Respondent's products. Under all the circumstances, Members Jenkins and Fanning conclude that the individual contracts here involved did not convert the status of the drivers who signed them from that of employees to that of independent contractors and that the drivers retained their em-

ployee status under the individual contracts. Member Jenkins and Fanning further find that the execution of the individual contracts with such drivers who were and remained employees of the Respondent constituted individual bargaining with those individual employees at a time when they were represented by the Union as their statutory representative, and thus the Respondent violated Section 8 (a) (5) and (1) of the Act.

With respect to the second of the two additional grounds referred to above, Members Jenkins and Fanning are of the view that the Respondent, by the execution of the individual contracts, modified or terminated the collective bargaining contract, without complying with the notice requirements of Section 8 (d) of the Act, for the following reasons. By enactment of Section 8 (d), the terms of which are set forth above, Congress intended to insure that parties to contracts in industries covered by the Act resort to collective bargaining to resolve differences regarding modification or termination of such contracts rather than to engage in strikes or lockouts which would obstruct commerce. To this end, parties to such contracts are obligated by Section 8 (d) to give proper notice of their intention to modify or terminate them and to offer to meet to resolve their differences. When the Respondent adopted its so-called independent distributorship plan by executing individual contracts with its drivers, it was under contract with the Union which was the statutory representative of its drivers. That contract expressly provided that "no employee shall be required to make a verbal or written contract which in any way conflicts with the articles of this agreement." When the Respondent required its drivers to execute the individual contracts on pain of discharge, the Respondent was acting to modify

the collective bargaining contract with the Union, as the terms of the individual contracts changed the terms of the collective bargaining contract and were inconsistent therewith. Nevertheless, the Respondent gave no notice to the Union of intent to modify its contract and did not offer to meet with the Union to discuss this determination. Thus, the Respondent failed to discharge the duties imposed upon it by Section 8 (d). Members Jenkins and Fanning, therefore, find that, by such conduct, the Respondent violated Section 8 (a) (5) and (1) of the Act.

Members Jenkins and Fanning also find, as did the Trial Examiner, that the six drivers, who refused to sign individual contracts, retained their status as employees, and that the Respondent violated Section 8 (a) (3) by discharging the six drivers. Members Jenkins and Fanning reach this conclusion on the basis of the following rationale. As the Union was the exclusive bargaining representative, the six drivers had a right to refuse to deal with the Respondent on an individual basis; the drivers were exercising such right in refusing to enter into individual contracts; and they were discharged for so doing.

Even if the Respondent did not violate Section 8 (a) (3) by discharging the six drivers, Members Jenkins and Fanning would order their reinstatement with back pay to remedy the 8 (a) (5) violation hereinafter found. *West Boylston Mfg. Co.*, 87 NLRB 808. Such relief is not limited by the Act to those cases in which the Board has found that Section 8 (a) (3) has been violated. The statute empowers the Board to fashion the remedy to the situation which calls for redress. In *West Boylston*, the Board found that an employer violated Section 8 (a) (5) by failing to confer with a union as to the recall of laid-off employees. Here, as in *West Boylston*, where

the Board ordered reinstatement with back-pay for the employees not recalled but not found to have been discriminated against within the meaning of Section 8 (a) (3), the six drivers lost their jobs as a direct consequence of the Respondent's failure to confer with the Union, and, by parity of reasoning, they should be restored to their jobs and made whole.

Member Bean finds that the Respondent engaged in no unfair labor practice alleged and votes to dismiss the entire complaint for the reasons stated in his separate opinion filed herewith.

Based on the combined vote of the Chairman and Members Jenkins and Fanning, the Board hereby finds that the Respondent violated Section 8 (a) (5) and (1) of the Act, as set forth above.

As indicated above, the Chairman and Member Bean have found that the Respondent did not violate Section 8 (a) (3) by discharging the six drivers, while Members Jenkins and Fanning have found that the Respondent committed such unfair labor practices. Under these circumstances, as a majority of the Board does not find that the Respondent violated Section 8 (a) (3) of the Act, the Board will dismiss the allegation of the complaint that the Respondent violated Section 8 (a) (3) of the Act by discharging the six drivers.

The Remedy

Chairman Leedom and Members Jenkins and Fanning have found that, by not according the Union an opportunity to bargain with respect to the adoption of the individual distributorship system as it affected the tenure of the employees, the Respondent violated Section 8 (a) (5) and (1).

Members Jenkins and Fanning are of the view that the remedy, which is set forth below, does not go far

enough to remedy the violation found. As the remedy in this case does not abrogate the unlawful individual contracts, they are of the view that it fails to restore the *status quo ante* and permits the Respondent to retain the fruits of its unlawful conduct. Accordingly, Member Jenkins and Fanning would order abrogation of these contracts so that effective bargaining on this subject may take place. However, Members Jenkins and Fanning, of course, go at least as far as the remedy ordered, and, therefore, they concur in this remedy for the purpose of framing a majority order in the case.

To remedy this violation, the Board finds that it will effectuate the policies of the Act to require that the Respondent accord the Union such an opportunity to bargain. Accordingly, we shall order that the Respondent bargain with the Union as the exclusive representative of employees in the appropriate unit, including the employees who signed individual distributorship contracts, concerning the subject matter stated above; and we shall enjoin the commission of the unfair labor practices found through the usual cease and desist provisions in our Order.

Pending fulfillment of its obligation to bargain, we shall require that the Respondent refrain from entering into any new independent distributorship contract with any person.[9]

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[9] The Board is aware that it has not resolved, by majority vote, the questions propounded by the Court in its remand order, but this is due to the fact that despite careful and persistent Board deliberations extending over a considerable period of time, a majority of the Board has been unable to reach agreement as to how these questions should be answered. In lieu thereof, each signatory to the instant Decision has submitted his individual views.

ORDER

Upon the entire record in this case, and pursuant to Section 10 (c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Shamrock Dairy, Inc., Tucson, Arizona, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union No. 310, as the exclusive representative of all regular relief and special drivers, and all plant men employed at the dairy of Shamrock Dairy, Inc., at Tucson, Arizona, but excluding all office and clerical employees, guards and supervisors as defined in the Act, with respect to adoption or continuance of a system of product distribution known as the independent distributorship plan insofar as it affects the tenure of its employees;

(b) Entering into any new independent distributorship contract with any person unless and until it bargains with the aforesaid labor organization as stated above;

(c) In any like or similar manner interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form labor organizations, to join or assist International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union No. 310, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purposes of collective bargaining or other mutual aid or protection, or to refrain from any or all such activ-

ities, except to the extent that such rights may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8 (a) (3) of the Act.

2. Take the following affirmative action, which the Board finds will effectuate the policies of the Act.

(a) Bargain, upon request, with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union No. 310, with respect to adoption or continuance of a system of product distributorship known as the independent distributorship plan insofar as it affects the tenure of its employees in the aforesaid appropriate unit, in accordance with the section of this Decision and Order On Remand entitled, "The Remedy."

(b) Post at the dairy in Tucson, Arizona, copies of the notice attached hereto as an Appendix.[3] Copies of such notice, to be furnished by the Regional Director for the Twenty-first Region, shall, after being duly signed by the Respondent's authorized representative, be posted by the Respondent immediately upon receipt thereof and be maintained by it for sixty (60) consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material;

(c) Notify the Regional Director for the Twenty-first Region in writing, within ten (10) days

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[3] In the event this Order is enforced by a decree of a United States Court of Appeals, there shall be substituted for the words "PURSUANT TO A DECISION AND ORDER ON REMAND" the words "PURSUANT TO A DECREE OF THE UNITED STATES COURT OF APPEALS, ENFORCING AN ORDER."

from the date of this Order, as to what steps the Respondent has taken to comply herewith.

IT IS FURTHER ORDERED that the complaint be, and it hereby is, dismissed insofar as it alleges that the Respondent violated Section 8 (a) (3) of the Act by discharging John Foley, Dave Egleston, Robert Pry, Alexander Toro, Frank Koenig, and John Kozacki.

Dated, Washington, D. C. Aug. 13, 1959

Boyd Leedom, Chairman
Joseph Alton Jenkins, Member
John H. Fanning, Member
(SEAL) NATIONAL LABOR RELATIONS BOARD

STEPHEN S. BEAN, MEMBER, dissenting in part and concurring in part:

This case is now before this Board on remand from the Court of Appeals for the District of Columbia under directions to reconsider the entire case, including certain questions set forth in a previous order of the court. Pursuant to this remand I have given the entire case my careful reconsideration and again am impelled to the conclusion which I set forth in my original dissenting opinion, that the record presents a material issue as to the fact of the charging Union's majority status which is crucial to the entire case and which can only be answered in the negative.

In this case, the charging Union's majority status was put in issue by the complaint's allegation that at all material times the Union represented a majority of the Respondent's employees, and the Respondent's answer asserting a lack of knowledge or information as to such majority, by reason of which it denied the allegation and demanded strict proof

thereof.[8] The Respondent did not abandon this position but continued to maintain it at the time this case was originally considered by the Board, as shown by its filing of an exception to the Trial Examiner's finding of the Union's majority status based upon the Respondent's execution of the contract in 1953.

The record shows that the Respondent has dealt with the Union, apparently on a multi-employer basis, since 1937. In October 1953 the Respondent, together with Borden Company, Carnation Company, and Sunset Dairy, all of Tucson, Arizona, entered into a contract with the Union covering the drivers and plantmen of these four employers together in a single unit, for a two-year term to October 1, 1955. The record contains not a bit of evidence that at any time from the beginning of, or during, this contractual relationship did the Union offer or the Respondent request any sort of proof of the Union's right to serve as a majority bargaining representative, either for the employees in a multi-employer unit or for a unit limited to the Respondent's employees. Nor does the record contain any evidence that the Union was in fact such a representative.[9] Indeed, insofar as the

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[8] Paragraph 6 of the complaint alleged that:

"At all times material herein, the Union has represented a majority of the employees of Respondent Dairy, Inc., in the unit described . . . above."

The following appears in the Respondent's answer:

"Answering Paragraph 6 of the complaint, Respondent Dairy, Inc. alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained therein and therefore denies the same and demands strict proof thereof.

[9] In lieu of evidence, my majority colleagues have relied upon two presumptions—(1) that possession by the union of majority representative status may be presumed from the

Respondent's own employees are concerned, I can only judge from the Respondent's answer formally denying knowledge of possession by the Union of majority status, that at least on the Respondent's part its recognition of and dealing with the Union must have been purely a "sweetheart" arrangement. This is a matter not to be taken lightly, for in this state of the record the Board is entirely without au-

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mere fact of the Respondent's recognition of and dealing with the union, and (2) that such status, thus established, is presumed to continue thereafter in the absence of evidence to the contrary. With the latter of these two presumptions I could, as a matter of general legal principle, agree; but I cannot agree that such a presumption as the former one exists, or, if it did exist, that it would not be completely rebutted by the Respondent's denial of knowledge that the union possessed, at any material time, such status.

Moreover, in law, the presumption that a state of things once shown continues to exist does not arise merely upon the basis of some prior presumption. The existence of that which is presumed to continue, must originally have been established by evidence. See American Jurisprudence, Vol. 20, page 205, at § 207, which states the proposition as follows:

> "It is well established that when the existence of a person, a personal relation, or a state of things is once *established by proof*, the law presumes that the person, relation, or state of things continues to exist as before, until the contrary is shown, or until a different presumption is raised from the nature of the subject in question." (Emphasis supplied.)

In the present case the possession of majority status by the union was as of no time established by proof, and hence the finding of such majority in this case is only by a departure from established legal principle and amounts to no more than piling the Pelion of one presumption upon the Ossa of another to reach a result which is not supported by the record.

thority to order the Respondent to bargain with the Union, and in doing so the Board is in fact doing nothing more than requiring the Respondent, under legal compulsion, to adhere to an unlawful arrangement.

As indicated above, I would not find the Respondent to have violated Section 8 (a) (5) by failing in any manner to deal with a labor organization as to which there is a complete negation of majority status.[10] As to the allegations of a Section 8 (a) (3) violation, I would dismiss them also because, in the absence of a showing of majority representation by the Union, the discharge of employees for failure to sign individual contracts governing their relationship with the Respondent cannot, as the General Counsel contends, be found to discourage a right to bargain through the Union.

In view of the disposition which I believe should be made of this case as shown by my opinion above, I

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[10] Even assuming the theory of my colleagues' decision, that the existence of majority representative status can be deduced from the fact merely of execution of a collective bargaining contract, there is yet another reason why it is error to apply it in this case. As above indicated, an examination of the 1953-1955 contract in the record discloses that it was executed by four dairy firms in the Tucson area, and by its terms covers the Respondent's employees in a single unit which includes also the employees of the other employers. In situations involving a multi-employer unit such as this, Board standards require only that the contracting union be the majority-representative of the employees in the unit as a whole, and it is not necessary, for a contract in such larger unit to be lawful, that the contracting union be designated by a majority among the employees of each separate employer. Thus, in any event, the contract can be of no value as an indication of the Union's status among the Respondent's employees considered as a separate unit.

do not reach the questions whether the Respondent complied with Section 8 (d) in negotiating individual contracts with the drivers, whether such contracts were effective in converting the status of employees to that of independent contractors. I shall therefore, with all deference and respect for the Court of Appeals which has remanded this case to the Board, refrain from attempting to resolve what in my view of the case have become only hypothetical issues.

Dated, Washington, D. C. Aug. 13, 1959

Stephen S. Bean, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO ALL EMPLOYEERS: PURSUANT TO A DECISION AND ORDER ON REMAND

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify our employees that:

WE WILL bargain collectively, upon request, with INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, LOCAL UNION NO. 310, with respect to adoption or continuance of a system of product distribution known as the independent distributorship plan. The appropriate unit is:

> All regular, relief and special drivers and all plantmen employed at our dairy in Tucson, Arizona, excluding all office and clerical employees, guards and supervisors as defined in the Act, as amended.

WE WILL NOT in any manner interfere with, restrain or coerce our employees in the exercise of the right to self-organization, to form labor organization, to join or assist INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, LOCAL UNION NO. 310, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purposes of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities, except to the extent that such rights may be affected by an agreement requiring member-

ship in a labor organization as a condition of employment as authorized in Section 8 (a) (3) of the Act.

All our employees are free to become, remain, or refrain from becoming or remaining members of any labor organization except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition to employment, as authorized in Section 8 (a) (3) of the Act.

SHAMROCK DAIRY, INC.
(Employer)

Dated By
(Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.